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Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals

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I. Introduction

1. The present report is submitted pursuant to the Security Council presidential statement of 19 December 2008 (S/PRST/2008/47), in which the Council requested the Secretary-General to present a report on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and the seat of the residual mechanism(s), including the availability of suitable premises for the conduct of judicial proceedings by the mechanism(s), with particular emphasis on locations where the United Nations has an existing presence.

2. Discussion in the Security Council Informal Working Group on the International Tribunals is ongoing, and there are many key areas where further decisions are needed. Bearing in mind the respective prerogatives of the Council and the General Assembly, the present report provides as much information as possible on the administrative and budgetary aspects in response to the Council's request, in order to assist the Council in making decisions on the substantive issues before it. When the Council has taken further decisions, a more detailed review of the administrative and budgetary implications that will flow from them could be made, and more specific estimates presented to the General Assembly for appropriate action. Until further decisions are taken, any estimates of administrative and budgetary implications are necessarily speculative and preliminary and cannot be validated.

3. The report therefore identifies the key areas where it falls to the Security Council to make decisions, in particular on which potential residual functions are to be transferred to the residual mechanism(s); presents very tentative rough estimates of the staffing requirements and costs on the basis of illustrative examples of a possible mechanism or mechanisms; and provides some objective information regarding the feasibility and costs of 14 potential locations for the mechanism(s) and/or archives with United Nations offices, or offices of other international organizations.

4. Against that backdrop, recommendations to the Security Council are set out in section VIII of the present report. It is suggested that, when agreement has been reached among members of the Working Group on further key issues as highlighted in the report, a further report be requested from the Secretary-General to go into greater depth on the establishment and location of the residual mechanism(s) and the location of the archives.

II. Context

5. In its presidential statement (S/PRST/2008/47), the Security Council acknowledged the need to establish an ad hoc mechanism to carry out a number of essential functions of the Tribunals ("residual functions"), including the trial of high-level fugitives, after the closure of the Tribunals. The Council requested the Secretary-General to submit a report aimed at furthering the work of the Working Group on the International Tribunals. That informal body, which consists of the legal advisers of the members of the Council, is not itself a decision-making entity,

but conducts substantive consideration of the issues, and will ultimately make recommendations to the Council.

6. During 2008, discussions in the Working Group were informed by various exchanges with the Tribunals. The Working Group was briefed by the Chairman of the Advisory Committee on Archives, which was established by the Tribunals to advise on possible locations for the archives and related issues. In a letter dated 19 December 2008, the Permanent Representative of Belgium to the United Nations, whose country chaired the Working Group in 2008, set out the main elements of the Working Group's discussions and conclusions at that stage (S/2008/849).

7. Discussions in the Working Group have continued since February 2009, under the Chairmanship of Austria, informed by a number of non-papers on the potential residual functions produced by the Chairman, with the assistance of the Office of Legal Affairs, and with input by the Tribunals. It is common ground among the members of the Working Group that the residual mechanism(s) should have a trial capacity based on a roster of judges, and that the mechanism(s) should be small, temporary and efficient, and comprise a small staff commensurate with the reduced functions in the post-completion period of the Tribunals. There has been some indication that the statutes of the residual mechanism(s) should be based on amended ICTY and ICTR statutes.

8. The main issues that remain to be resolved in the Working Group include which of the potential residual functions should be transferred to the residual mechanism(s); whether there should be one mechanism or two, and the related question of its (their) location; whether the resolution should determine a specific date on which the mechanism(s) will commence functioning, or whether that date should be determined later in the light of the progress of the Tribunals towards completion; whether the jurisdiction of the mechanism(s) should extend to all fugitive indictees at the date of closure of the Tribunals, or only to a limited list of such indictees, and, if the latter, how to ensure that there is no impunity for the remaining indictees; whether the mechanism(s) should have authority to refer further cases to national jurisdictions, and whether it (they) should have authority to revoke such referrals, or any referrals previously made by the Tribunals; what the structure of the mechanism(s) should be, including whether the judges on the roster(s) of the mechanism(s) should be chosen from the permanent and ad litem judges of the Tribunals, and whether the roster(s) should be supplemented by election and/or appointment by the Secretary-General; and where the archives should be located, including whether they should be co-located with the mechanism(s).

III. Methodology

9. The present report draws on the Working Group's discussions and takes into account the various documents provided by both Tribunals to the Working Group, including the Tribunals' joint paper, the report of the Advisory Committee on Archives on the Tribunals' archives, the responses given by the Tribunals to various questions from the Working Group, and the most recent staffing and cost estimates for a residual mechanism provided by each Tribunal. There was a close dialogue with the Tribunals throughout the preparation of the report, in writing and in person, and their views have been reflected. The Archives and Records Management Section

of the United Nations, the Office of the Controller and the Office of Human Resources Management provided key assistance and support in the preparation of the report. The Governments of the countries of the former Yugoslavia and Rwanda ("affected countries") were invited to present their views, which are reflected in the report.

10. Other documents consulted include the report of the Secretary-General on the long-term financial obligations of the United Nations with regard to the enforcement of sentences by ICTR[1] and the report on the residual functions and residual institution options of the Special Court for Sierra Leone, of 16 December 2008, prepared by a consultant appointed by the Court.

11. Thirteen potential locations (with United Nations offices) and the International Criminal Court were consulted on the basis of the suggestions made by the Advisory Committee on Archives and the Tribunals. Each of them was requested to respond to a standard questionnaire describing minimal infrastructure requirements for the storage and maintenance of the Tribunals' archives, and for a courtroom facility.

12. The detailed information provided by those various sources is not presented in the present report, but it will be made available to the members of the Working Group.

IV. Potential residual functions

13. Twelve residual functions were initially presented in the Tribunals' joint paper; the Tribunals now suggest that eight essential residual functions be performed by the residual mechanism(s): (a) trial of fugitives; (b) trial of contempt cases; (c) protection of witnesses; (d) review of judgements; (e) referrals of cases to national jurisdictions; (f) supervision of enforcement of sentences; (g) assistance to national jurisdictions; and (h) maintenance of the archives. Capacity-building activities in the affected countries were also mentioned by the Tribunals as an important element of their legacy.

14. There is agreement in the Working Group that the trial of high-level fugitives should be performed by the residual mechanism(s). There is, however, no determination yet as to which of the current 15 fugitives — all of them, or some of them — should fall within the jurisdiction of the mechanism(s). Further, there is not yet agreement as to whether the mechanism(s) should retain the power to refer those fugitives falling within its (their) jurisdiction to national authorities and, if so, to revoke any such referral, where appropriate. It is agreed that if any of the current 15 fugitives do not fall within the jurisdiction of the mechanism(s), they should not enjoy impunity. There is, however, not yet any agreement on how their trial by national authorities should be ensured.

15. There is agreement in the Working Group that the management of the Tribunals' archives is one of the principal residual functions and that, as the archives are the property of the United Nations, they must be kept under its control. There is, however, not yet any agreement on whether the archives would be administered by, and co-located with, the residual mechanism(s).

[1] A/57/347, 26 August 2002; the report was prepared at the request of the General Assembly (see resolution 55/226).

16. Section A below briefly describes each of the eight potential residual functions which the Tribunals consider essential for the residual mechanism(s) to perform. Each function involves a combination of judicial, prosecutorial and administrative activities, which are described in further detail in section B. In section C, a number of issues are set out for the consideration of the Security Council when deciding which of the residual functions should be transferred to the mechanism(s).

A. Description

17. Of the eight essential residual functions identified by the Tribunals, some are ad hoc in nature (in some cases, they might never be performed), while others require day-to-day follow-up and management and are of an ongoing nature.

1. Trial of fugitives

18. The trial of fugitives will be an ad hoc function of the residual mechanism(s), to be performed as and when a fugitive is arrested and transferred to the mechanism(s). As of the date of the present report, 2 ICTY indictees and 13 ICTR indictees remained at large. ICTY has already indicated that Ratko Mladić and Goran Hadžić are considered as high-level accused to be tried at the international level. Similarly, ICTR has indicated that 4 of the 13 remaining fugitives (Augustin Bizimana, Félicien Kabuga, Protais Mpiranya and Idelphonse Nizeyimana) are considered as high-level accused to be tried at the international level. Indications from the Tribunals are that each of those six cases would be tried in single-accused trials.

19. In the course of trial proceedings, a Trial Chamber decision or order may be appealed. According to the Tribunals' Rules of Procedure and Evidence, most of such interlocutory appeals require certification by the Trial Chamber. Exceptionally, other Trial Chamber decisions, such as those on preliminary motions challenging jurisdiction or on provisional release, may also be appealed as of right. Final decisions, such as judgements and decisions on requests for referral to a national jurisdiction, may also be appealed on alleged errors of law and errors of fact.[2] The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers and, in certain circumstances, order that the accused be retried before the Trial Chamber.[3]

20. Appeals proceedings are not limited to the trial of fugitives: decisions on contempt cases, protective measures, review (by the Trial Chamber) and referral of cases may be also appealed.

2. Trial of contempt cases

21. Under the Tribunals' Rules of Procedure and Evidence,[4] each Tribunal may hold in contempt those who knowingly and wilfully interfere with its administration

[2] Article 25, ICTY statute; article 24, ICTR statute.

[3] Rule 117 (C) of the ICTY Rules of Procedure and Evidence; rule 118 (C) of the ICTR Rules of Procedure and Evidence. On 29 August 2008, the Appeals Chamber ordered, for the first time in either Tribunal, the retrial of an ICTR accused (*The Prosecutor v. Tharcisse Muvunyi*, Judgement (AC), 29 August 2008).

[4] Rule 77, ICTY and ICTR Rules of Procedure and Evidence.

of justice. This is an ad hoc function which may occur, for example, where a witness before a Chamber wilfully refuses to answer a question; a person knowingly discloses confidential information in violation of a Chamber's order; or a person threatens, intimidates, offers a bribe to, or otherwise interferes with a witness who is giving, has given, or is about to give evidence before the Tribunal.

22. In case of alleged contempt, the Prosecutor, or the Chamber or an amicus curiae appointed at the Chamber's request, conducts the investigation. If the Chamber is satisfied that there are sufficient grounds to proceed, it may either direct the Prosecutor to prosecute the matter (an indictment will then be issued), or issue an order in lieu of an indictment (and either direct an amicus curiae to prosecute the matter, or prosecute the matter itself).

23. The Tribunals have indicated that the continued protection of victims and witnesses and the effective administration of justice require a judicial capacity to sanction any violation of Tribunals' orders. Thus far, 43 contempt cases have been initiated at ICTY. Of those, 22 individuals were indicted for contempt of the Tribunal, including interference with witnesses, disclosure of the identity and/or testimony of protected witnesses, refusal to answer questions in court and failure to answer a subpoena. Two accused were acquitted and nine were sentenced to periods of imprisonment of 3 to 12 months and, in some instances, to the payment of a fine (€7,000-€20,000). As of the date of the present report, 11 cases of contempt are still ongoing at ICTY.

24. At ICTR, there have been numerous motions for contempt. Thus far, one person has been convicted for false testimony and sentenced to nine months of imprisonment, and the judgement in another case concerning a Defence investigator alleged to have interfered with a witness is expected to be delivered later in 2009. There are four other cases at the investigation stage, including one case in which a Trial Chamber directed the Registrar to appoint an amicus curiae to investigate alleged false testimony and contempt by two Prosecution witnesses.

3. Protection of witnesses

25. Under the Tribunals' statutes, the trial proceedings have to be conducted with due regard for the protection of victims and witnesses.[5] The issuance or variation of witness protection orders by a Chamber is an ad hoc judicial function, while the implementation of witness protection is an ongoing administrative function for the Registry. The Office of the Prosecutor may carry out protective measures for the purpose of investigations and to support the prosecution at trial (e.g., for informants and their families).[6] At ICTR, as of the date of the present report, there were 15 persons protected by the Office of the Prosecutor.

26. A Chamber may issue orders to safeguard the security of witnesses, including non-disclosure to the public of identifying information about a witness or relatives, expunging names and identifying information from the Tribunals' public records, hearing witnesses in closed session and assigning pseudonyms. Except if otherwise specified in the decision, the protective measures remain in force until a subsequent decision by a Chamber to rescind or vary them. Varying protective orders may be

[5] Article 20, ICTY statute; article 19, ICTR statute. See also article 22, ICTY statute; article 21, ICTR statute.

[6] Rule 39, ICTY and ICTR Rules of Procedure and Evidence.

necessary when, for instance, an accused person in other proceedings before the Tribunal seeks to have access to information relevant to his or her defence; a party in domestic proceedings, including national prosecuting authorities, seeks to have access to information relevant to its case; or national immigration authorities seek to have access to information relevant to asylum or immigration requests of a protected witness.

27. The implementation of protective orders is performed by a section within the Registry of each Tribunal. It mainly involves keeping track of protected witnesses and informing them, where necessary, of the release of convicted persons in whose cases they have testified; providing a contact point for protected witnesses who wish to have their protective measures amended or who need additional support; monitoring and assessing threats to ensure that the protective measures for specific victims and witnesses remain effective; and maintaining cooperation with States where protected witnesses have been relocated.

28. The great majority of the Tribunals' witnesses are subject to some form of protection. As of the date of the present report, more than 1,400 ICTY witnesses and 2,300 ICTR witnesses were subject to protective orders. Further, ICTY, on behalf of the United Nations, has concluded 13 agreements under which States accept in principle to consider the relocation of witnesses to their territory.

29. The Tribunals have stressed that maintaining adequate monitoring and protection is essential to ensure the continued participation of witnesses and victims in the Tribunals' proceedings and to protect them from retribution in their societies and elsewhere. They add that, more generally, witness and victim protection is essential to maintaining public confidence in the international criminal justice system.

4. Review of judgements

30. Under the Tribunals' statutes,[7] where a new fact is discovered which was not known at the time of the trial or appeals proceedings, and which may have been a decisive factor in reaching the judgement, the convicted person or the Prosecutor may submit an application for review of the judgement. The Tribunals' Rules of Procedure and Evidence limit the right of the Prosecutor to request review to a period of 12 months after its delivery. The Trial Chambers of both Tribunals, and the Appeals Chamber, have the power to review judgements. This function is necessarily linked to the prior proceedings before the concerned Tribunal. It is an ad hoc function that is ideally carried out by the same bench that delivered the original judgement.[8]

31. Review of judgement has two distinct steps: the Chamber conducts a preliminary examination to determine whether all the requirements for a review have been met,[9] and, if they have, it conducts a substantive review of the judgement after hearing the parties, including any evidence they present.

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[7] Article 26, ICTY statute; article 25, ICTR statute.

[8] Rule 119, ICTY Rules of Procedure and Evidence; rule 120, ICTR Rules of Procedure and Evidence.

[9] The Chamber must be satisfied that: there is a new fact; this fact was not known by the moving party at the time of the proceedings before the Trial Chamber or Appeals Chamber; the lack of discovery of the new fact was not through lack of diligence on the part of the moving party; and the new fact, if proved, could have been a decisive factor in reaching the original decision.

32. To date, 10 requests for review filed by the convicted persons and 1 by the Prosecution have been dealt with at ICTY by the Appeals Chamber. None of them has passed the stage of the preliminary examination and, consequently, no judgement has been reviewed substantively so far. At ICTR, 10 requests were filed by the convicted persons and 1 by the Prosecution. Of those 11 requests, 1 was dealt with by the President, one by a Trial Chamber and 9 by the Appeals Chamber. In one of the cases, the Appeals Chamber granted the Prosecutor's request to review its decision to terminate the proceedings against the accused.[10] Over the life of ICTY, the number of review cases per year has varied between zero and four, while the number of ICTR review cases per year has varied between zero and three. The Tribunals stress that they consider review of judgements to be an essential residual function, the unavailability of which constitute an impingement upon the rights of the convicted individuals.

5. Referral of cases to national jurisdictions

33. Pursuant to Rule 11 bis of the Tribunals' Rules of Procedure and Evidence, after an indictment has been confirmed, the Tribunal may decide to refer the case of an accused for trial to the national authorities of a State in whose territory the crime was committed, or in which the accused was arrested, or which has jurisdiction and is willing and adequately prepared to accept the case. The decision to refer a case to national authorities is an ad hoc function. It is a judicial decision rendered by a Chamber specifically designated by the President. In determining whether to refer the case, the Chamber must be satisfied that the accused will receive a fair trial, and that the death penalty will not be imposed or carried out. Furthermore, at any time before the accused is convicted or acquitted by the national court, the referral of the case may be revoked by the Chamber at the Prosecutor's request. This may occur, for example, when the Chamber determines that national proceedings violate the rights of the accused to a fair trial.

34. When a case is referred to a State, the Prosecutor may send observers to monitor the proceedings. Any information as to the progress of referred cases before the national authorities, including whether the rights of the accused are guaranteed, is transmitted by the Prosecutor to the Chamber. The monitoring of the referred cases is an ongoing activity.

35. Thus far, ICTY has referred the cases of 13 accused. It considers that the cases of the four accused awaiting the commencement of their trial, and of the two remaining fugitives are not to be referred because of the seriousness of the crimes alleged and/or the seniority of the accused. The cases of three accused were referred by ICTR to national courts, one of which was later revoked. The ICTR Prosecutor intends to seek the referral of 9 of the 13 remaining fugitives to national jurisdictions. He has, however, indicated difficulties in finding States willing and adequately prepared to accept these cases. The Trial Chambers denied the ICTR Prosecutor's requests to refer five cases to Rwanda. Three of these decisions have been appealed by the Prosecutor but confirmed by the Appeals Chamber. The

[10] *The Prosecutor v. Jean-Bosco Barayagwiza*, Decision (Prosecutor's request for review or reconsideration) (AC), 31 March 2000.

Prosecutors of both Tribunals have developed strategies with regional agencies for the monitoring of the referred cases.[11]

6. Supervision of enforcement of sentences

36. The Tribunals' statutes provide that sentences of imprisonment are served in accordance with the applicable law of the State where the convicted person is imprisoned, subject to the supervision of the Tribunals.[12] If, pursuant to the applicable law of the concerned State, the convicted person is eligible for pardon or commutation of sentence, the State shall notify the Tribunal accordingly. After consulting the judges, the President decides whether to grant pardon or commutation of sentence.[13] While this function is essentially an ongoing administrative one, it has ad hoc judicial aspects.

37. When deciding whether to grant pardon, commutation of sentence or early release, the President takes into account several criteria, including the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly situated prisoners and the prisoner's demonstrated rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor. Of the 39 applications for early release submitted thus far, the ICTY President has granted 22, while the 6 applications submitted so far at ICTR were all denied.

38. The Registrar is responsible for the administrative management of this function, including negotiating enforcement agreements with States; conducting preliminary enquiries with States when an accused is convicted in order to provide the President with relevant information for the designation of the enforcement State; making arrangements for the transfer of convicted persons from the Tribunal to the enforcement State; providing support to the President in case of a request for pardon, commutation of sentence or early release (including providing the relevant information to the President and making the practical arrangements in case of release); making the arrangements for the transfer or the relocation of the person once he or she has served the sentence, or when it becomes impossible to enforce the sentence; and, in case of death, making the necessary arrangements for the repatriation of the body of the convicted person.

39. Both Tribunals have concluded agreements with various States on the enforcement of sentences.[14] The great majority of those agreements entrust the International Committee of the Red Cross (ICRC) with the task of inspecting the conditions of detention of the convicted persons. Some agreements concluded by ICTY on behalf of the United Nations designate the European Committee for the

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[11] ICTY has concluded an agreement with the Organization for Security and Cooperation in Europe for monitoring the trials referred to Bosnia and Herzegovina, Croatia and Serbia. ICTR has concluded an agreement with the African Commission on Human and Peoples' Rights to monitor, on an individual basis, cases referred to African States. ICTR has also concluded two agreements with law firms in France to monitor the trials of the two cases referred to that country.

[12] Article 27, ICTY statute; article 26, ICTR statute.

[13] Article 28, ICTY statute; article 27, ICTR statute.

[14] ICTY has concluded agreements with Italy, Finland, Norway, Austria, Sweden, France, Spain, Denmark, the United Kingdom of Great Britain and Northern Ireland, Belgium, Ukraine, Portugal, Estonia, Slovakia, Poland and Albania, and ad hoc agreements with Germany (see http://www.icty.org/sections/LegalLibrary/MemberStatesCooperation). ICTR has concluded agreements with Mali, Benin, Swaziland, France, Italy, Sweden and Rwanda (see http://69.94.11.53/ENGLISH/agreements/index.htm).

Prevention of Torture and Inhuman or Degrading Treatment or Punishment, or a joint parity commission composed of ICTY and State officials. The inspecting authorities conduct regular and unannounced visits in the enforcement States, and present confidential reports to the relevant Tribunal and the detaining authorities.

7. Assistance to national authorities

40. Since the outset of the Tribunals, assistance to national authorities has been a key element of the work of the Office of the Prosecutor of each Tribunal. On a regular basis, and increasingly as the Tribunals move towards completion, each Office of the Prosecutor responds to requests for assistance from national prosecutors and other bodies, such as national immigration authorities, and United Nations agencies. This ongoing function is considered essential by the Tribunals to maintain the ability of the national legal systems to prosecute those not subject to proceedings before the Tribunals. The disclosure of material concerning protected witnesses to national authorities may require a Chamber's decision to vary the protective measures (see paras. 25-29 above).

8. Management of the archives

41. According to the Secretary-General's bulletin on United Nations archives and records management, of 26 June 1991, the archival records of the United Nations include "the archives of the United Nations Secretariat units away from Headquarters and subsidiary organizations of the United Nations".[15] The Tribunals are subsidiary organs of the Security Council, and consequently their archives are the property of the United Nations.

42. The Secretary-General's bulletin on record-keeping and the management of United Nations archives, of 12 February 2007, defines the archives of the United Nations as "records to be permanently preserved for their administrative, fiscal, legal, historical or informational value", regardless of form or medium.[16] In the course of their activities, the different organs of both Tribunals have generated a wide range of records. Their use is primarily related to the judicial activities of the Tribunals, but they also have a secondary value for memory, education and research. Not all of the records of the Tribunals are considered to be records to be permanently preserved. Who the users of the records are, and will be, is important in determining which records need to be preserved and what access needs to be provided to them. It will be a factor when considering where the archives should be located. The management of the archives is an ongoing function.

(a) Content of the Tribunals' records

43. The Tribunals' records exist in various formats, including paper, electronic and audio-visual formats, and in the form of artefacts. Some of the records are not to be made publicly available unless it is decided otherwise. These include transcripts of closed trial sessions, any documents containing identifying information of protected witnesses (such as exhibits, statements and Chambers' decisions) and confidential administrative documents. A significant part of the records at the Office of the Prosecutor comprise documents that have been provided to the Prosecutor on a

[15] ST/SGB/242.
[16] ST/SGB/2007/5.

confidential basis. Those documents cannot be disclosed without the consent of the person or entity providing the initial information.[17] The proportion of public documents to confidential documents varies according to the category of records, and from Tribunal to Tribunal. It will also vary over time, since further records may be classified as confidential and others may be progressively declassified and made publicly available. As is further explained below (see para. 195), confidential documents require specific management measures, including being kept separately from public documents and under strict security conditions.

44. The Tribunals' records may be divided into three main categories: (a) judicial records related to the cases; (b) records which are not part of the judicial records stricto sensu but are generated in connection with the judicial process; and (c) administrative records.

45. Judicial records comprise the records of each case, which are generated by the Chambers, Registry, Prosecutor, Defence, accused and third parties (e.g., States, amicus curiae). They are managed by the Court Management Support Services of the ICTY Registry and the Court Management Section of the ICTR Registry. For each case, they include, in hard copy and/or electronic format, the indictment(s), motions, correspondence, internal memorandums, orders, decisions, judgement, disclosure, exhibits and transcripts (in both working languages of the Tribunals, English and French), and the translations of any of the above documents. Judicial records also include the audio and visual recordings of the proceedings, as well as any artefact admitted.

46. Records that relate to the judicial process but are not part of the judicial records of the case are produced and managed by the Office of the President, the Office of the Prosecutor and the Registry. The Office of the President generates and keeps records related to plenary meetings of the judges; meetings of sub-organs of the Tribunal participating in main decisions related to its functioning (such as the Bureau and the Coordination Council); annual reports and completion strategy reports; diplomatic relations and other representations; and various correspondence.

47. The Office of the Prosecutor retains various documents and material, including video or audiotapes, artefacts, interviews and statements of suspects, accused, victims and witnesses, information obtained from Governments, United Nations organs and intergovernmental and non-governmental organizations. The records of the Office of the Prosecutor which are not used during trial proceedings are preserved and remain exclusively managed by the Office of the Prosecutor, separately from the records managed by the Registry. The records of the Office of the Prosecutor also contain documents related to prosecution policy and practice, and correspondence.

48. In addition to the judicial records for each case managed by the Court Management Support Services of the ICTY Registry and the Court Management Section of the ICTR Registry, the other sections of the Registry generate and produce various records related to the judicial process. The Victims and Witnesses Section of each Tribunal keeps records in connection with the protected witnesses, such as their identifying information. The ICTY Office of Legal Aid and the ICTR Defence Counsel and Detention Management Section produce and keep records connected to, inter alia, the management of the list of Defence counsel, the appointment and withdrawal of counsel, the review of their fees and subsequent

[17] Rule 70, ICTY and ICTR Rules of Procedure and Evidence.

payments. Records are also produced in connection with the detainees, including personal details of them and their families, visitor records, disciplinary records, change of custody records and medical records.

49. In addition, the Office of the Registrar generates and keeps various records, such as those concerning privileges and immunities of the Tribunal; agreements with the host country; contracts and commercial arrangements; agreements on enforcement of sentences; agreements on relocation; claims against the organization; diplomatic relations and other representational matters; documents related to meetings and general correspondence. The public information section of the Registry also issues press releases, reports, booklets, posters, photographs and audio and videotapes (of press conferences and interviews by the Tribunals' representatives), and administers the Tribunals' websites.

50. The third category of records, the administrative records of each Tribunal, is related to human resources, procurement, finance and other administrative support functions. They are generated and managed by the Registry of each Tribunal.

51. Some of the above-mentioned records have only a temporary value and are to be disposed of over the coming years. This process should be completed as much as possible before the closure of the Tribunals. ICTY has estimated that the total of its physical records by the end of 2010 will require 3,704 shelf metres and that its electronic records will increase by as much as 8,000 terabytes[18] or more (which will require specific server rooms). The projected storage needs for paper records for ICTR by 2010 is 2,336 shelf metres, while the Tribunal has estimated the total amount of digital storage requirements at 1,020 terabytes by 2010 (which will require specific server rooms).

52. Those estimates will need to be adjusted, as a records appraisal is ongoing to determine which records have permanent value and will therefore be considered as "archives of the Tribunals" and which have temporary value; and, in the latter case, how long they need to be kept.

(b) Values and users of the Tribunals' records

53. Records are saved so that they may be used. Archivists refer to records as having "primary value" for the creating institution and "secondary value" for research and memory.

54. The judges, Prosecutors, Registrars, respective staff members and Defence counsel are the primary users of the Tribunal's records and gain primary value from them. When the residual mechanism(s) commence functioning, the judges, Prosecutors, Registrars, respective staff members and Defence counsel will be the primary users of the Tribunals' records and will gain primary value from them. In case of arrest and trial of a fugitive, there will be a need to access the records of the case, including the indictment, supporting material and any other material already filed in the case, the Prosecution files and orders and decisions issued by a judge or Chamber (such as confirmation of, and amendments to, the indictment). Any party in a case at the residual mechanism(s), or authorized parties in another jurisdiction, may also request access to other Tribunals' records relevant to their case, such as

[18] A terabyte is a unit of measurement for digital information storage; 1 terabyte is equal to 1,024 gigabytes or 1 trillion bytes.

statements of witnesses, maps and exhibits, and transcripts of closed sessions from other cases.

55. The performance of other potential residual functions, whether by the residual mechanism(s) or by another body, will also require access to the Tribunals' records. If a witness who testified before the Tribunals claims that he or she fears for his or her security or is intimidated, the individual's case file, including documentation as to his or her protection, must be made available. In case of requests for review of judgement and allegations of contempt, there will be a need to have access to the relevant original records of proceedings before the Tribunals. Likewise, when a decision is being made on the referral of a case to national authorities, or on its revocation, there will be a need to have access to records of prior similar cases, including prior decisions and orders and, where necessary, prior submissions filed and any other relevant documents. In cases of requests for pardon or commutation of sentences, the convicted persons file, including any evidence of cooperation with the Office of the Prosecutor, must also be available.

56. National authorities investigating and prosecuting individuals, as well as national immigration authorities, will also need access to the Tribunals' records, including confidential documents. Over the past few years, both Tribunals have been seized with an increasing number of requests from national authorities of the affected countries and from other countries holding trials.

57. Some administrative records may also have primary value for former staff members of the Tribunals who may wish to access their personal records in the years after the closure of the Tribunals. Only a small proportion of administrative records, however, are likely to be considered to have archival value.

58. Furthermore, the performance of any potential residual functions by the residual mechanism(s) will also generate new records, which will be closely related to the Tribunals' records.

59. The primary value of the Tribunals' records will progressively diminish over time as the residual functions are no longer needed. Thereafter, the secondary value of the archives, namely, their memory, education and research value, will progressively prevail. The content of the Tribunals' archives is significant to victims, witnesses and their families and, more widely, the populations of the affected countries. Government officials, other international tribunals and courts, such as the International Criminal Court, journalists, historians, legal researchers, political scientists and persons interested in memorializing an event or creating educational materials, may also seek access to the Tribunals' records.

B. Type of work generated

60. The present section analyses in more detail the type of work generated by the above-mentioned residual functions in terms of the prosecutorial, judicial and administrative activities involved. Such activities are necessarily linked, and the level of each type of activity varies according to the residual function in question. Overall, it can be said that judicial proceedings related to protective measures, referral of cases, preliminary examination of review applications, appeals and pardon and commutation of sentences, require a "reduced operational" capacity because they are focused on particular legal and/or factual issues, are mainly dealt

with in writing and involve a reduced volume of documents. Trial of fugitives, trial of contempt cases and substantive review of judgements, on the other hand, need a "full operational" capacity. The presence of the trial judges is required at all times during the presentation of the evidence in court, as well as Prosecution and Defence counsel. Trial support staff will also be necessary, including co-counsel, investigators and Defence and Prosecution legal assistants.

1. Judicial activities

61. Trial of fugitives and, to a certain extent, trial of contempt cases and substantive review of judgements, involves a large amount of judicial work, with frequent and repeated in-court hearings. Prior to the commencement of the trial, various hearings are held by the Trial Chamber or a judge, including initial and any further appearance of an accused and status and pretrial conferences aimed at organizing the commencement of the trial and streamlining the proceedings. In addition, the Trial Chamber or, where appropriate, a judge, disposes of any pretrial matters, including motions seeking the amendment of the indictment, challenging jurisdiction, alleging defects in the form of the indictment, seeking protective orders for witnesses or alleging failure to disclose documents necessary for the preparation of the defence, thereby precluding the commencement of the trial. While hearing the evidence in court, the Trial Chamber deals with many interlocutory matters, mainly in connection with the admission of evidence and the management of the trial. The adjudication of any interlocutory matter requires hearing the parties, in writing and/or in court, and may involve reviewing a large number of documents. After the closure of the presentation of the evidence, the Trial Chamber reviews all the oral and written evidence admitted, including the transcripts of the proceedings and the various exhibits, as well as the parties' closing briefs and arguments. Hearings are held for the parties' closing arguments and subsequently for the delivery of the judgement.

62. In comparison with trial, judicial proceedings related to protective measures, referral of cases, preliminary examination of review applications, appeals and pardon and commutation of sentences, are shorter and involve fewer or no in-court hearings. They are dealt with mainly in writing, by the Trial Chambers, Appeals Chamber or President. The volume of written submissions varies from one case to another, but remains confined to specific legal and/or factual issues. While the Trial Chamber or Appeals Chamber may decide to hear the parties in court, such hearings remain exceptional and of short duration. For example, in the case of appeals against judgement, the Appeals Chamber may hold an evidentiary hearing, which might last one or two days, in addition to hearing the parties' arguments on the merits of the appeal.

2. Prosecutorial activities

63. The trial of remaining fugitives will require a tracking and investigative component to locate them and secure their arrest. ICTY has further indicated that where an accused has been at large for some years, the indictment will need to be reviewed in terms of the evidence available and the most recent case law. Upon the arrest of a fugitive, additional investigations may therefore be needed to ascertain the content of the evidence to be given by potential Prosecution witnesses, to confirm their availability and, where necessary, to replace the evidence of witnesses who are no longer able or willing to testify.

64. In case of alleged contempt, an investigative component is also required to prepare the indictment and collect the relevant evidence, including witness statements and Prosecution exhibits. The review of a judgement may also require further investigations prior to the trial proceedings. During trial proceedings (for trial of fugitives, contempt cases and review of judgements) up to the closing arguments, a Prosecution trial team is required to present the evidence in court. This includes the preparation of the Prosecution pretrial brief (which outlines the Prosecution case for the court), the preparation for the examination of both Prosecution and Defence witnesses, and then the examination in court of those witnesses, the compilation of the exhibits to be tendered in evidence and further investigations where necessary. At the same time, the Prosecution ensures that all the required material has been disclosed to the Defence, including any exculpatory material the Prosecution may discover in the course of the proceedings. It also addresses any matter arising in the course of the proceedings, including any motions from the opposite party and orders of the Chamber. After the presentation of all the evidence, the Prosecution prepares and submits its closing arguments.

65. The judicial activity related to protective measures, referral of cases, preliminary examination of review applications and appeals also requires prosecutorial activity, as the Prosecution is a party to these proceedings. The amount of work is reduced compared with trial activities, as variation of protective orders, requests for referral, preliminary examination of review applications and appeals are mainly dealt with in writing and call for very occasional oral hearings. In the case of requests for pardon or commutation of sentence, the Prosecutor may also be requested to submit a report as to whether the convicted person has provided any cooperation to the Office of the Prosecutor.

66. Important prosecutorial activities are performed in the context of cooperation with States. Prior to applying for referral of a case to a national jurisdiction, the Prosecutor's practice is to ascertain from the concerned State whether the requirements have been met for the referral of the case. After a case has been referred, the Prosecutor is responsible for the monitoring of the proceedings. The Prosecutor also addresses requests for assistance from States and United Nations agencies, seeking disclosure of information or documents in the Prosecutor's possession.

3. Administrative activities

67. The performance of the above-mentioned activities requires the assistance of an administration in charge of human resources, budget and finance and general services management. Such administrative support is no different from that provided in any United Nations body. The present section therefore focuses only on the administrative support provided by the Registry in connection with the prosecutorial and judicial activities performed.

68. In view of the volume and type of work involved as described above, the trial of fugitives and, to a certain extent, contempt cases and trial proceedings in case of review of a judgement, require substantial assistance from all units of the Registry. The Registry is in charge of filing, distributing and translating any document filed in the case, such as motions, correspondence, disclosure, exhibits, decisions and orders. It is responsible for the management of the archives, which involves recording, preserving and, where necessary, retrieving any judicial records. The

Registry is also responsible for implementing records management programmes and ensuring that all the Tribunal's organs comply with United Nations record-keeping standards and requirements.

69. Where trial proceedings are ongoing, the Registry ensures the smooth running of the court proceedings by liaising with the parties, ensuring the availability and functioning of courtroom facilities and providing any other assistance required by the Chamber (such as videoconferences). It provides the necessary court support staff (court officers, interpreters, court reporters, video unit, witness protection and security staff) and maintains accurate and complete court records. The Registry is responsible for the detention of the accused and his or her attendance in court. It monitors the protection of witnesses, as well as their safe attendance in court. It also provides any necessary legal aid to accused who are found to be indigent. In doing so, it monitors the roster of qualified Defence counsel, their assignments and their remuneration.

70. Judicial activities related to protective measures, referral of cases, preliminary examination of review applications, appeals and pardon and commutation of sentences rarely require in-court hearings and, in principle, generate a reduced volume of documents, since they are confined to specific legal issues. The Registry's support is of the same nature as when a trial is ongoing, but similarly reduced. On the other hand, the monitoring and protection of witnesses generates substantial work for the Registry's section in charge of implementing protective orders. As described above (para. 27), the monitoring and protection of witnesses involves a variety of duties and actions extending beyond the protection of witnesses during trial proceedings.

71. Likewise, the monitoring and management of enforcement of sentences generates a lot of administrative work (see para. 38 above). The Registry acts as focal point for the inspecting authority, and for the States, on any matters arising. It ensures follow-up on the reports provided by the inspecting authority and provides assistance to the President in connection with requests for commutation and pardon. The referral of a case to national authorities also requires the Registry to make the necessary arrangements for the transfer of the accused and relevant records to the concerned State.

C. Issues arising from the possible transfer of residual functions other than to the residual mechanism(s)

72. It is important to keep in mind the distinction between residual functions that relate back to proceedings of the former Tribunals, and those which are generated by new trials of fugitives by the residual mechanism(s). It is clear that the mechanism(s) will need to have most, if not all, of the residual functions in relation to new trials of fugitives in order to be able to conduct these proceedings effectively. For example, the mechanism(s) will need to be able to protect those appearing as witnesses, and to sanction violations of its (their) own orders, including for the protection of witnesses. It (they) will need to be able to take the necessary measures for the enforcement of the sentences of those it (they) convict(s).

73. As for the residual functions that relate back to proceedings before the Tribunals, if the Security Council decides not to transfer some of them to the residual mechanism(s), there will be a need to consider and decide which other

entities could effectively carry them out. Failure to do so could impinge upon the rights of individuals, and/or jeopardize public confidence in the international criminal justice system. The functions described above as "ongoing" (including protection of witnesses, monitoring of referred cases, enforcement of sentences and assistance to national prosecution authorities) will require some continuous day-to-day management. It would be inadvisable for the Council not to consider how those functions should be carried out after the Tribunals' closure if any of them are not to be transferred to the mechanism(s).

74. Further, in relation to the trial of fugitives, it is agreed among the members of the Working Group that the closure of the Tribunals should not result in impunity. It follows that if the Security Council were to decide that the mechanism(s) will not have jurisdiction over all fugitives, it would need to decide how to ensure that the remaining fugitives are tried. In doing so, the Council should bear in mind the rights of the accused, including the right to a fair trial, and should consider, for example, whether there is a risk that the death penalty would be applied.[19] One option for the Council would be to transfer to the mechanism(s) the power to refer cases to domestic jurisdictions under rule 11 bis of the Tribunals' Rules of Procedure and Evidence. The advantage of a rule 11 bis procedure would be that a judicial decision would be taken concerning the jurisdiction and willingness of the national courts to try the accused. This procedure would also guarantee that the accused would be referred only to a jurisdiction which provides for the protection of his or her rights, and where the death penalty will not be applied. As a further protection for the accused, the Council may wish to consider whether the mechanism(s) should also have the power of revocation.

75. The Tribunals were established as temporary and ad hoc organs to contribute to the process of national reconciliation and to the restoration and maintenance of peace in the affected countries,[20] given the nature of the crimes and the inability of the national jurisdictions to carry them out at that time. Some 15 or 16 years later, it might be argued that the judicial capacity of those countries has moved forward and it is therefore possible to consider transferring to them residual functions relating to proceedings before the Tribunals. Transferring residual functions to national jurisdictions or other international bodies may also have cost and efficiency attractions by offering the possibility of reducing the size and cost of the residual mechanism(s).

76. The transfer of certain functions (e.g., the trial of referred cases, or trial of certain of the fugitives) might be regarded as the restoration by the Security Council of a jurisdiction that the national authorities would have exercised, but for the establishment of the Tribunals. However, the Council may wish to consider whether the transfer of other functions (e.g., for contempt of the Tribunals, or for review of the Tribunals' judgements) would, in effect, amount to giving the national jurisdictions entirely new areas of competence to pronounce on matters that had previously been exclusively under an international jurisdiction.

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[19] The maximum penalty that can be imposed by the Tribunals is life imprisonment (see article 24, ICTY statute; article 23, ICTR statute). See also rule 11 bis of the ICTY and ICTR Rules of Procedure and Evidence, which exclude the referral of cases to national jurisdictions in which the death penalty would be imposed or carried out.

[20] Security Council resolutions 808 (1993) and 955 (1994).

77. The transfer of residual functions other than to the residual mechanism(s) would also raise legal and practical issues for the Security Council to take into account. The description of the residual functions, and activities generated by them, in section IV above demonstrates that all of the functions are closely interconnected. The Council may therefore wish to consider whether dividing functions among the mechanism(s), national jurisdictions, and possibly also other international bodies, would have an adverse impact on the effective performance of those functions, including whether there would be any adverse effect on the rights of individuals. Further, the fact that the Tribunals have existed and exercised an international jurisdiction for a lengthy period of time inevitably has an impact on whether the functions can simply be handed to a disparate set of national jurisdictions without adversely affecting the rights of the individuals concerned.

78. If the protection of witnesses protected by the Tribunals were transferred to national authorities, including jurisdiction for the national courts to amend the Tribunals' protective orders, there would no longer be a centralized means of monitoring the protection of those Tribunals' witnesses. There would be a likelihood of different national jurisdictions approaching the issues differently and with different standards of protection. In an extreme situation where a protected witness claims that the authorities in the country in which he or she resides are not sufficiently protecting him or her, would the ability to seize only a judge of that jurisdiction offer sufficient guarantees? In a situation where, for his or her protection, a witness should be relocated to another country, the national authorities are not likely to be as well placed to find, negotiate, arrange and manage that relocation as a centralized protection unit of the mechanism(s).

79. In the case of contempt of the Tribunals (e.g., false testimony), it may be difficult or impractical for a national jurisdiction, which had no involvement in the trial proceedings, to determine an issue which relates directly to those proceedings, and to the Tribunal's statute and Rules of Procedure and Evidence. The residual mechanism(s), on the other hand — particularly if managing the Tribunal's archives and with judges who were formerly judges of the Tribunal concerned — would be in a much stronger position to decide upon the contempt.

80. If the review of judgements were transferred to national jurisdictions, they would similarly be likely to apply different approaches and standards, in relation both to the Tribunals and to each other. It might be difficult or impractical for a national jurisdiction to review a judgement in which it played no role and to do so on the basis of the Tribunals' statutes and Rules of Procedure and Evidence. There would inevitably be inconsistencies of approach among the various national jurisdictions. The individuals concerned might challenge unsuccessful review applications in national jurisdictions on the basis that they had a right to review of judgement under the Tribunals' statutes,[21] and that that protection has been diminished, or is being applied inconsistently among similarly placed convicted persons in different jurisdictions. The review would be conducted not only by a court constituted differently from the one that issued the judgement, but by an entirely separate jurisdiction. In addition, the Security Council may wish to consider

[21] Article 26, ICTY statute; article 25, ICTR statute. Convicted persons might also argue that review is a right by reason of customary international law, as it appears to be a common feature of all national jurisdictions.

whether there would be a risk that transferring this function to national jurisdictions could lead to impunity.

81. Similar issues might arise if pardon and commutation of sentences were transferred to national authorities. The Presidents of the Tribunals apply standard criteria when deciding on pardon or commutation. If such functions were transferred to national jurisdictions, there would inevitably be differing approaches and inconsistency of treatment among those convicted. Again, this could lead to challenges on the basis that the rights of those convicted are not being effectively and equally protected.

82. Finally, it should be noted that the Tribunals have already concluded agreements with other international bodies for them to carry out some aspects of their functions (e.g., the International Committee of the Red Cross and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment for the inspection of conditions of detention of convicted persons, and the Organization for Security and Cooperation in Europe and the African Commission on Human and Peoples' Rights for the monitoring of referred cases). It would seem advisable for the residual mechanism(s) to continue those arrangements.

V. Period prior to the commencement of the residual mechanism(s), potential start date, jurisdictional continuity and potential duration of the mechanism(s)

83. The present section considers the period prior to the commencement of functioning of the residual mechanism(s), the start date and duration. It also discusses the legal issues arising in the context of the transfer of functions from the Tribunals to the mechanism(s).

A. Period prior to the closure of the Tribunals and/or commencement of the residual mechanism(s)

84. A number of steps should be taken by the Tribunals prior to their closure to reduce outstanding work as much as possible before the commencement of the residual mechanism(s). The Tribunals have made it clear that taking these steps would require additional resources because they are fully occupied with the completion of trials and appeals. In addition, the Security Council may wish to consider, in consultation with the Tribunals, any appropriate measure to support the completion strategy of the Tribunals, such as an expansion of the Appeals Chamber.

1. Referral of cases

85. In so far as it is possible, the Tribunals should refer further cases to national jurisdictions before their closure. Of course, the referral of cases will depend on the cooperation of States, including their willingness and ability to receive the cases.

2. Capacity-building

86. Strengthening the judicial and prosecuting capacity of the affected countries is a key element of the Tribunals' mandates and will be an important legacy. Effective capacity-building may assist in the Tribunals' efforts to refer further cases to national jurisdictions and to support national prosecuting authorities. Of course, the Tribunals' capacity-building and outreach programmes, which are funded by voluntarily contributions of States, need adequate resources and staffing to produce effective results.

3. Archives

87. Because of the volume and nature of the Tribunals' records and the variety and complexity of the formats in which they are stored, a range of steps should be taken before transferring the Tribunals' records to another body (whether the residual mechanism(s) or not). These include identifying the records to be permanently preserved (which would be then considered as archives); disposing of any duplicate records and any temporary value records that can be destroyed before the Tribunals' closure; declassifying as many records as possible; and transferring all electronic records currently stored on various local and network storage to the main Tribunals' operational and archival databases, as appropriate. Both Tribunals, in close coordination with the Archives and Records Management Section, are currently drawing up records retention schedules. These should be finalized now, and implemented following approval by the Secretariat. Further, the Tribunals should assist the Secretariat in identifying and making necessary additions to the current Secretary-General's bulletins governing the management and preservation of United Nations records and archives.

88. The joint archives strategy working group, an informal group established by the Registrars of the Tribunals and composed of representatives of ICTY, ICTR, the Archives and Records Management Section and the Office of Legal Affairs, has developed and has been implementing a strategic plan to deal with these issues since 2007.

89. An important priority in preparing the archives for transfer to the residual mechanism(s) is the identification and, where appropriate, declassification of confidential records. Such records include documents and material received confidentially under rule 70 of the Rules of Procedure and Evidence by the Offices of the Prosecutor of ICTY and ICTR. The records also include multimedia records, such as witness testimonies, which present technical challenges in the review and declassification process. The expertise and knowledge necessary to declassify the Tribunals' records rest with its current staff. The mechanism(s) would face significant challenges in connection with the preservation of, and provision of access to, confidential records that have not been appropriately screened by current Tribunals' staff prior to their closure.

4. Witness protection

90. The withdrawal or variation of any protective orders issued by the Tribunals that are no longer necessary would decrease the number of issues faced by the residual mechanism(s) related to the protection and monitoring of protected witnesses (including access by national authorities to records containing information on witnesses). The Tribunals will need to consider the best way to achieve that goal,

bearing in mind the interests of the protected witnesses. Withdrawals and variations of protective orders would require judicial decisions by the competent Chambers of the Tribunals. They would further require adequate staffing, to undertake, among other things, the substantial work of contacting the protected witnesses, where appropriate.

5. Agreements and contracts concluded by the Tribunals

91. Both Tribunals have concluded a number of agreements with States related to, for example, enforcement of sentences and witness relocation. They have also concluded contracts with private entities. Prior to their closure, the Tribunals should review all those agreements and contracts and determine whether there are any which do not need to remain in force when the residual mechanism(s) start(s) functioning.

6. Possible advance team

92. ICTR has suggested that an advance team be established in the period prior to the commencement of the residual mechanism(s). In other words, as the completion period progresses, some of the Tribunals' staff could be assigned to the preparation of the closure of the Tribunals and the start of the mechanism(s). The aim would be to ensure a smooth transition.

B. Start date of the residual mechanism(s)

93. The Working Group has considered options for the commencement of the residual mechanism(s), including a specific date to be decided by the Security Council; a "trigger" — a date to be determined later in the light of the progress of the Tribunals towards completion; and a two-stage approach, involving a decision in principle to establish the mechanism(s), followed later by a decision on its (their) commencement. The members of the Working Group have not ruled out the possibility of a limited overlap, with the mechanism(s) commencing functioning while the Tribunals are finalizing their work.

94. In the view of ICTY, the Tribunals should gradually downsize until their work has been completed and then be replaced by the residual mechanism(s). ICTR, on the other hand, suggests that the mechanism(s) should start on a certain date, or at the time of a certain event (e.g., completion of all trial proceedings), with downsized Tribunals remaining in place to complete their remaining work. In the view of ICTR, that approach would allow the mechanism to hire competent staff from the Tribunals and therefore improve continuity.

95. If the residual mechanism(s) commence(s) on a specific date chosen in advance by the Security Council, and the Tribunals are terminated on that date, it is likely that some trial and/or appeals proceedings will be still ongoing in one or both Tribunals on that date. In that event, the mechanism(s) would need to be staffed and ready to start in trial mode. Further, to avoid the risk of having to restart a trial, the same judges as composed the Tribunal's Trial Chamber should continue the trial or trials in question at the mechanism(s). Failure to ensure that the same judges composed the Trial Chamber would run the risk of challenges to the fairness of the

trial proceedings on the basis that the judges newly appointed would not have heard the evidence from the beginning.[22]

96. If, on the other hand, the commencement of the residual mechanism(s) is linked to a trigger (e.g., the completion of all the current ongoing trials and appeals before each Tribunal), the fact that the work of the two Tribunals is unlikely to be completed at exactly the same time becomes relevant. The Security Council would need to decide how any such period of difference would be handled, including whether the mechanism(s) would commence while one of the Tribunals was completing its work.

97. The Security Council may also need to consider how the arrest of a fugitive at an advanced stage of completion of the Tribunals' work should be handled. It is essential to know whether the Tribunals would, in that event, be competent to take some judicial steps in the case (e.g., holding the initial appearance as soon as possible after the arrest and transfer of the accused), and then either complete the trial or transfer the case to the residual mechanism(s); or whether the mechanism(s) should be activated to begin the case, while the corresponding Tribunal would be finishing its ongoing work. In this second scenario, there would be some overlap in the existence of the institutions.

98. In any scenario where the Tribunals (or one of them) and the residual mechanism(s) coexisted for a period, it would be essential for the Security Council to make their respective jurisdictions and competences absolutely clear.

C. Jurisdictional continuity between the Tribunals and the residual mechanism(s)

99. Upon the closure of the Tribunals, it will be crucial to remove any risk of challenge to the continuing validity of the Tribunals' official documents, including the indictments, judgements, decisions and orders. Likewise, if the Security Council decides to establish the residual mechanism(s) to carry out functions inherited from the Tribunals, there will be a need to remove any risk of challenge to the jurisdiction of the mechanism(s). For example, it will have to be absolutely clear that the mechanism(s) has (have) the jurisdiction to order the arrest of and try fugitives initially indicted by the Prosecutors of the Tribunals, to amend indictments in connection with cases initiated by the Tribunals and to implement or amend decisions that had been taken by the Tribunals (such as decisions varying protective measures).

100. There has been discussion in the Working Group of the residual mechanism(s) continuing the Tribunals' "rights and obligations". Such reference in the eventual Security Council resolution establishing the mechanism(s) would assist in clarifying that the mechanism(s) would take on the Tribunals' rights and obligations under bilateral agreements with States, and contractual and other such rights and

[22] Rule 15 bis of the ICTY and ICTR Rules of Procedure and Evidence provides for the possibility of having one judge, who is unable to continue sitting in a part-heard case, substituted under specific circumstances. After the opening statements of the Prosecutor, such substitution can be done only with the consent of the accused. If the accused withholds his or her consent, the remaining judges may decide to continue the proceedings with a substitute judge if they determine that doing so would serve the interests of justice. Only one substitution may be made in a case.

obligations, but would not be sufficient to ensure the continuity of the jurisdiction of the Tribunals. It would be advisable for the Council to make this continuity of jurisdiction between the Tribunals and the residual mechanism(s) explicit in its eventual resolution. Basing the statutes of the mechanism(s) on amended ICTY and ICTR statutes may also contribute to making clear this continuity of jurisdiction.[23]

D. Issues relevant to the potential duration of the residual mechanism(s)

101. The question of the duration of the residual mechanism(s) remains open among the members of the Working Group, and indeed, there may be no need to take any definitive decision at this stage. The Security Council may wish, for example, to decide simply that there should be a review of the situation after a number of years.

102. It is impossible to predict when fugitives to be tried by the residual mechanism(s) will be arrested. Similarly, it is not possible to foresee when, and how often, requests related to contempt cases, protective orders, review of judgements, referral of cases and pardon and commutation of sentences will arise. However, it can be said in general terms that such issues are more likely to arise within a period of 10 to 15 years after the closure of the Tribunals[24] and that the level of work involved — whatever the number of functions that are entrusted to the mechanism(s) — will inevitably decrease over time.

VI. Potential structure, tentative staffing and other foreseeable costs

103. It is clear that the residual mechanism(s) would have particularly active periods when a trial or trials are under way, and less active ("dormant") periods when carrying out any "ongoing" functions assigned to it (them), but not engaged in trial activity. The structure (section A below) and staffing (section B) of the mechanism(s) will therefore need to be flexible enough to be activated quickly and efficiently to address any burst in activity.

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[23] When the International Court of Justice was established (and, consequently, the Permanent Court of International Justice terminated), various steps were taken to maintain the functional continuity of the two Courts: Article 92 of the Charter of the United Nations states that the Statute of the International Court of Justice is based upon the Statute of the Permanent Court of International Justice; the general structure of the Statute (including the numbering of its articles) was maintained, and some specific provisions of the Statute were included to keep in force various treaties and agreements conferring jurisdiction on the Permanent Court of International Justice and ensure the continuity of jurisdiction of the International Court of Justice (articles 36 (5) and 37, Statute of the International Court of Justice). The Permanent Court of International Justice archives were co-located with the International Court of Justice.

[24] The Tribunals have estimated that most requests for review are likely to occur within the first 10 to 15 years following the completion of trials and appeals; and applications for commutation of sentence, pardon or early release can be anticipated until at least 2027 for ICTY and until around 2030 for ICTR.

A. Potential structure of the residual mechanism(s)

104. This section deals with elements for a potential structure of the residual mechanism(s).

1. Current organization of the Tribunals

105. Under their respective statutes, each Tribunal consists of the following organs: the Chambers, comprising three Trial Chambers and an Appeals Chamber; the Prosecutor; and a Registry.[25]

106. To conduct a trial, a Trial Chamber is composed of three judges.[26] Some matters may be decided by a single judge (e.g. initial appearance of the accused, pretrial conferences, status conferences, rulings on some motions, issuance of protective measures). For each appeal, the Appeals Chamber is composed of five judges. The Appeals Chamber is common to both Tribunals and composed of judges from each Tribunal.[27] The judges of the Chambers are elected by the General Assembly from a list submitted by the Security Council.[28] The President is elected from among the permanent judges. He or she coordinates the work of the Chambers, including designating the judges to compose a Chamber and supervising the activities of the Registry as well as exercising all the other functions conferred on him or her by the statute and the Rules (such as ruling on requests for pardon or commutation of sentence, the Registrar's decisions on defence counsel issues or conditions of detention).[29]

107. The Prosecutor, who is appointed by the Security Council on the nomination of the Secretary-General, is responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the concerned Tribunal. The Prosecutor acts independently as a separate organ of the Tribunal. He or she cannot seek or receive instructions from any Government, or from any other source.[30] The Registry is responsible for the administration and servicing of the Tribunals. The Registry consists of a Registrar and such other staff as may be required. The Registrar is appointed by the Secretary-General after consultation with the President of the Tribunal.[31]

2. Potential organization of the residual mechanism(s)

108. The Working Group has considered, but not yet agreed, whether there should be one single mechanism, one mechanism with two branches, or two separate mechanisms. There is agreement within the Working Group that the residual mechanism(s) should have a trial capacity, based on a roster of judges to be activated to compose a trial or appeals chamber when needed. It has not discussed in detail whether the structure should follow that of the Tribunals. As the mechanism(s) will need to be able to react quickly and efficiently to take up trial activities when needed, and as those trial activities will be residual to the prior

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[25] Article 11, ICTY statute; article 10, ICTR statute.
[26] Article 12, ICTY statute; article 11, ICTR statute.
[27] Article 14 (4), ICTY statute; article 13 (4), ICTR statute.
[28] Articles 13 bis and 13 ter, ICTY statute; articles 12 bis and 12 ter, ICTR statute.
[29] Rule 19, ICTY and ICTR Rules of Procedure and Evidence.
[30] Article 16, ICTY statute; article 15, ICTR statute.
[31] Article 17, ICTY statute; article 16, ICTR statute.

activities of the Tribunals, it would seem inadvisable to consider any new structure that departs radically from the existing structure of the Tribunals, and indeed of international criminal tribunals generally. The same basic structure would be likely to produce the greatest efficiency and continuity. While the defence is not an organ as such under the Tribunals' statutes, it would of course be crucial to ensure adequately resourced representation of the accused to guarantee the fairness of trials, and the protection of the rights of the accused and convicted persons.

109. The Tribunals have expressed the view that there should preferably be two separate residual mechanisms, with a common appeals chamber and possibly some common administrative management. According to ICTY, as the work of the two mechanisms will decrease over time, merging them may become more realistic at a later stage.

110. In view of ICTR, a separate president and registrar are needed for each residual mechanism, or branch, because the tasks to be performed would require specific knowledge of the context and jurisprudence of each Tribunal. ICTY considers that the question of one or two presidents will depend on the actual structure of the mechanism (including whether there will be one or two mechanisms). While ICTY can envisage that there would be one common prosecutor, ICTR suggests maintaining a prosecutor at the seat of the ICTR mechanism for two years from its commencement to speed up the tracking and trial of the 13 remaining ICTR fugitives, and then having a non-resident prosecutor remotely supported by a head of office to undertake the prosecutorial functions. In the view of ICTY, while there would be a legal need for a prosecutor to be in office, his or her physical presence at the seat of the mechanism would only be required when there is an ongoing trial. The office of the prosecutor could be run by a head of office at all other times. If a time is reached where only a few fugitives remain at large, ICTR suggests outsourcing the tracking of those fugitives to the International Criminal Police Organization (INTERPOL). ICTY, however, believes that INTERPOL does not have the ability to carry out operational work, and therefore could not track fugitives.

111. Both Tribunals consider that the potential residual functions require the active presence of a registrar at all times. ICTY believes that the president should be resident on a full-time basis, because the need for judicial activity can never be ruled out. Conversely, ICTR acknowledges that the anticipated workload would not seem to warrant the presence of a president for each residual mechanism or branch on a full-time basis, and therefore suggests, as an alternative, having two non-resident presidents remotely supported by a legal team at the seat(s) of the mechanism(s).

112. As section IV above indicates, the functions to be performed and the type of activity generated by each function would essentially be the same for each residual mechanism or branch. It is correct that each Tribunal has been established in a particular context, but the commonality of functions tends to support the suggestion that the president and prosecutor (if that is the structure accepted by the Security Council) could be shared by the mechanism(s) with the support of competent and adequate staff having context-specific knowledge of the work and jurisprudence of each Tribunal. It should be recalled that until 2003, the ICTY Prosecutor also served

as the ICTR Prosecutor. The decision to have a specific prosecutor for ICTR was initiated to support the Tribunals' completion strategy.[32]

113. Furthermore, in the absence of the arrest of a fugitive and trial activity, it is difficult to imagine that the volume of work would be such as to require the president(s) and prosecutor(s) on a full-time basis at the seat(s) of the residual mechanism(s). While requests for pardon or commutation of sentence (if that function is assigned to the mechanism(s)) are most likely to occur during the first years of the mechanism(s), requiring action by the president, such issues are mainly dealt with in writing, and could therefore be performed remotely. Similarly, the president's representational functions would not necessarily require his or her presence on a full-time basis at the seat of the mechanism(s). The prosecutor's role in tracking and securing the arrest and transfer of the fugitives focuses on obtaining the assistance and cooperation of States, which may require travel, but not necessarily full-time presence at the seat of the mechanism(s). In any event, if the Security Council were to decide that the mechanism(s) should start with one president and prosecutor, it would of course be open to the Council to revisit that position if necessary as events develop.

114. A registrar, on the other hand, is likely to be needed at each residual mechanism, or branch, to oversee the carrying out of the residual functions and to activate the roster of judges and staff promptly whenever a fugitive is arrested and transferred to the mechanism(s). In the absence of a full-time president, the registrar would in effect act as the administrative "head" of the institution on a day-to-day basis, in close coordination with and under the supervision of the president.[33]

115. The Tribunals recommend a separate roster of judges for each mechanism. ICTR further proposes that each roster be composed of 15 judges, that the rosters include judges elected to the Tribunals (whether they have served or not) and, where necessary, that the rosters be expanded through further elections or appointments by the Secretary-General. ICTR suggests that, in the selection of judges from the roster, those judges who have served at the Tribunal should be assigned to judicial activity first.

116. A roster or rosters of judges who had formerly served at the Tribunals would offer the advantage of bringing their institutional knowledge and experience to the residual mechanism(s). This does not exclude the possibility that there might also be an election or appointment of further judges to the roster to supplement those from the Tribunals. It cannot be guaranteed, of course, that all of the judges previously serving at the Tribunals would continue to be available or willing to be appointed to the roster. If there were a single roster for the two mechanisms or branches, no doubt the president(s) would be likely to manage it in such a way that judges who had previously served at ICTY would be designated at the mechanism to handle ICTY trials and functions, and judges who had served at ICTR would be designated to handle ICTR trials and functions. The roster should comprise a sufficient number of judges so that each mechanism or branch is able to hear cases at both the trial and

[32] See S/2003/766.

[33] In the report on residual issues prepared for the Special Court for Sierra Leone, the consultant suggests establishing a permanent secretariat managed by a head of secretariat/registrar. This secretariat would be a small, full-time office responsible for managing the ongoing residual functions in coordination with the president and prosecutor and for activating the judicial machinery in case of trial proceedings.

the appeals stage at the same time, namely, at least eight members for each mechanism or branch (a total minimum of 16 judges). Further, there should be provision for regular updating of the roster of judges to ensure that at any time, there will be enough judges available in the event of judicial activity.

117. The presence of judges at the seat of the residual mechanism(s) would not be required at all times. Some judicial functions (protective measures; preliminary examination of review applications; referral of cases; and appeals proceedings) are mainly dealt with in writing and, most of the time, require very few, and possibly no, in-court hearings. These functions could therefore be carried out away from the seat of the mechanism(s). The Statute of the International Criminal Court, for example, provides that the Presidency may, on the basis of the workload of the Court, and in consultation with its members, decide from time to time to what extent the judges shall be required to serve on a full-time basis.[34] This option might also be considered for the mechanism(s).

118. On the other hand, the presence of a judge may be required at very short notice, such as for the initial appearance of a fugitive transferred to the residual mechanism(s). Upon the transfer of a fugitive, in accordance with the rights of the accused,[35] he or she must be brought before a judge without delay, to be informed of the charges and to enter a plea of guilty or not guilty. To the extent that urgent situations require a judicial presence at the mechanism(s), solutions may include having a judge permanently present, or having a judge able to be available at the mechanism within a couple of days.[36] There is no particular need for that judge to be the president, but the Security Council may wish to consider whether that would be the most convenient given that the president would have other duties at the seat of the mechanism(s) from time to time.

119. Establishing one residual mechanism in one location, with both of the Tribunals' archives co-located with and co-managed by the mechanism, would probably offer the greatest cost-effectiveness (depending on the location chosen). All of the organs would benefit from economies of scale and the in-house presence of a single administration headed by a single registrar. The archives unit would manage both Tribunals' archives and the records of the mechanism. However, it would be difficult to reconcile this approach with the needs of the affected populations — a single mechanism could not be located on both continents, with proximity to all of the affected populations (see para. 200 below concerning the criteria to take into account when determining the location(s) of the archives). There would inevitably be difficult practical issues and additional costs related to bringing witnesses to testify at the mechanism. There would also be an important political and presentational disadvantage to locate the mechanism remotely from one or both of the affected populations.

120. In any event, when deciding whether there should be one residual mechanism or two, the Security Council may wish to consider the possibilities for shared services. In either scenario, the main administration section (payroll, budget, procurement and human resources management) could be co-managed, with an administration officer at the seat of each mechanism or branch to deal with local

[34] Article 35 (3), Statute of the International Criminal Court.

[35] Article 21, ICTY statute; article 20, ICTR statute.

[36] The Tribunals' Rules of Procedure and Evidence make provision for a roster of duty judges to deal with urgent matters (rule 28, ICTY and ICTR Rules of Procedure and Evidence).

issues such as time and attendance records, small procurement, visa/entitlement issues, travel, etc. The Tribunals emphasize that protection of victims and witnesses requires staff with specific expertise in relation to the conflicts of the former Yugoslavia and Rwanda. This expertise, however, could be adequately incorporated at the working level of the mechanism(s). Ensuring context-specific knowledge at the working level may also be a means to enable the appointment of a common president and prosecutor.

121. In the scenario where two residual mechanisms or two branches of one mechanism are established in two different locations, the appointment of a common president and prosecutor should not be excluded. The presence of a head of the office of the president/chef de cabinet and a head of the office of the prosecutor would probably be sufficient when no fugitive is arrested and no trial is ongoing. On the other hand, as stated above, the full-time presence of a registrar at each mechanism or branch may be necessary from the commencement of the mechanism(s) to act as the administrative "head", in close coordination with and under the supervision of the president.

B. Tentative staffing estimates

122. This section aims to present only very tentative estimates of the type of staff necessary to perform a range of tasks, and resulting staff costs, as well as other foreseeable costs resulting from the performance of certain residual functions. As mentioned in paragraph 2 above, there are many key areas where agreement is yet to be reached among members of the Working Group, which in turn affects the feasibility of answering the Security Council's request fully. Until further decisions are taken, the estimates in this section are necessarily speculative and preliminary, and cannot be validated. When such decisions have been taken, a more detailed review of the administrative and budgetary implications that will flow from the Council's decisions can be made, and more specific estimates presented to the General Assembly for appropriate action.

123. The Tribunals have provided their views on staffing requirements on various bases — where no trials are ongoing, and where one or two trials are ongoing; and where all the fugitives, or the great majority of them, remain at large, and where no fugitives remain at large. This input has been used as the basis for making tentative estimates of the staffing needs of the residual mechanism(s) for each of the illustrative examples set out below.

124. The illustrative examples describe tentative staffing estimates where a "minimal" number of residual functions are transferred to the residual mechanism(s); where a "medium" number of residual functions are transferred to the mechanism(s); and where a "maximum" number of residual functions are transferred to the mechanism(s). None of these examples is a recommended outcome. They have been chosen simply to reflect the fact that there is a range of views among the members of the Working Group on how many of the residual functions should be transferred to the mechanism(s).

125. The examples also describe the effect on staffing when there are trial activities ongoing, and when there are not. Each illustrative example describes briefly the type of activity for the chambers, the office of the president, the prosecutor and the Registry. These descriptions are without prejudice to the discussions in the Working

Group as to the potential structure of the residual mechanism(s). The preliminary estimates of staffing figures set out are for one branch of the residual mechanism (in the case of a single mechanism with two branches) or for one mechanism (in the case of two mechanisms). In other words, the staffing and cost estimates below should be doubled to obtain the estimates for the totality of the mechanism(s). The estimates take account of the view of the members of the Working Group that the staff should be small and efficient, commensurate with the reduced work of the mechanism(s). The estimates take full account of the need for staff to be flexible and to perform multiple tasks. They therefore represent a "lean" approach to staffing which, in reality, would need to be kept under review and the numbers increased if the workload were to exceed expectations.

126. It must be stressed that the adequate and appropriate staffing of the residual mechanism(s) at any particular stage of its (their) activities will be essential to the successful fulfilment of the mandate. The mechanism(s) will need to have flexibility in recruiting the staff to adjust to the actual needs and workload at any particular time. To that end, rosters of legal officers, experts, consultants, prosecution and defence counsel, translators, interpreters and court reporters should be considered as a basis for operating. The rosters would be compiled and regularly updated by the registry.

127. The examples do not present staffing estimates for the pure administrative functions of the residual mechanism(s) (human resources, finance, etc.) because the most efficient and economical solution is likely to be to attach the administrative management to an existing United Nations office, or other suitable international body.[37] The costs of sharing such services would depend upon the size of the mechanism(s) established by the Security Council and upon the specific United Nations or other office chosen. At this stage of consideration of the issues, it was not feasible to obtain figures for this aspect. It could be explored at the stage when the Council has narrowed down the options for the possible location(s) and structure of the mechanism(s).

128. It should be noted that the rough estimates presented below are highly tentative and cannot be validated, and aim to assist the Security Council as far as possible at this stage in its consideration of the matter. Clearly, the location(s) of the residual mechanism(s) and archives will have an impact on certain costs.

1. Minimal level of functions

129. In this illustrative example, only the trial of the remaining fugitives and the management of the archives are transferred to the residual mechanism(s). It is assumed that the office of the prosecutor, in addition to tracking fugitives, would continue its function of assistance and cooperation with national prosecution authorities. It is further assumed that, where there is a trial ongoing, the mechanism(s) would have the full range of functions necessary to support that process, including the protection of witnesses, trial of contempt cases of the mechanism(s), review of the judgements and enforcement of sentences. The staffing projections are estimated below in circumstances where there are no trials ongoing before the mechanism(s); where there is one trial of a fugitive ongoing; and where there is more than one trial ongoing.

[37] For example, the International Criminal Court.

(a) No trial ongoing, assistance to national authorities and management of the archives

130. The fugitives to be tried by the residual mechanism(s) remain at large and no trial is ongoing. The types of activity to be discharged can be summarized as follows:

Chamber	No activity (except if requests to access confidential records in the archives)
Office of the president	* Where necessary, representation of the mechanism(s) (e.g. reports to the General Assembly and Security Council) and general policy on the operations (e.g. designation of judges to a case)
Office of the prosecutor	* Tracking the fugitives and securing their arrest
	* Responding to requests for cooperation and assistance from States
Registry	* Management of archives
	* Management of the registry's staff to ensure prompt activation of the judicial machinery in case of arrest of a fugitive (e.g. compiling and updating rosters of legal officers, counsel, experts, etc.)

131. In the light of the anticipated workload under this scenario, the president and prosecutor will not be needed on a full-time basis at the seat of the residual mechanism(s). The presence of the registrar(s) at the seat of the mechanism(s) seems advisable on a full-time basis. One to three judges might be required on an ad hoc basis to rule on variation of protective measures to allow third persons access to confidential records of the Tribunals' archives (e.g. request from a State to obtain the statements of a protected witness). An appeals chamber, composed of five judges, might be required on an ad hoc basis in case of appeals against a decision varying protective orders. These issues are dealt with mainly in writing, and it is clear that the presence of these judges would not be necessary on a full-time basis at the seat of the mechanism(s).

132. Each office (office of the president, office of the prosecutor and the registry) would need the support of an administrative assistant. In addition, the office of the president would require the assistance of an experienced legal officer as head of the office of the president/chef de cabinet, who, where appropriate, would further assist the trial chamber or judge. To address requests for assistance from States and United Nations bodies, the office of the prosecutor would need the support of a small legal team, preferably composed of one experienced legal officer and one junior legal officer, and perhaps two document managers. The experienced legal officer would act as the head of the office of the prosecutor. Depending on the actual number of remaining fugitives, the tracking and investigation team would require at least two experienced investigators and one language assistant.

133. In the registry, an experienced legal officer would be necessary to provide assistance to the registrar on a range of matters, including, for example, external communication with States and the public. One chief archivist would probably be sufficient for the oversight of both Tribunals' archives. Each of the archives of the

Tribunals would then require the support of an audio-visual archivist and an electronic records archivist, a legal officer, two reference and processing archivists, three archives assistants/records repository staff, an information technology team (preferably composed of an associate information technology officer and an assistant), an administrative officer and one receptionist/administrative assistant.

134. It is estimated that the residual mechanism or branch, in this illustrative example, would have a staff totalling around 25. The cost of this tentative staffing complement would be roughly in the region of $3.5 million per annum.

(b) Trial of one fugitive ongoing and management of the archives

135. In addition to the management of the archives, there is one accused being tried by the residual mechanism(s). The types of activity to be performed will include the following:

Chamber	* Trial of a fugitive
	* Where necessary, management of requests to access confidential records in the archives and orders for protection of witnesses (called to testify in the case of the fugitive before the mechanism(s))
	* Where necessary, requests for review (preliminary examination) (for those convicted by the mechanism(s) only)
Office of the president	* General policy on the operations (e.g. designation of judges to a case) and, where necessary, representation of the mechanism(s)
	* Enforcement of sentences (for those convicted by the mechanism(s) only)
	* Requests for pardon or commutation of sentences (for those convicted by the mechanism(s) only) (if arising)
	* Appeals of registrar's decisions (on defence counsel issues, conditions of detention, etc.) (if arising)
Office of the prosecutor	* Tracking the fugitives and securing their arrest
	* Responding to requests for cooperation and assistance from States
	* Filing submissions
	* Attending court proceedings and dealing with presentation of evidence
Registry	* Filing, distributing and translating documents
	* Liaising with States, including for the transfer of the fugitive (from the State of arrest, and then to the enforcement State, if convicted)

* Monitoring and protecting witnesses called to testify in the trial of the fugitive

* Supervision of enforcement of sentences (for those convicted by the mechanism(s) only)

* Management of archives

* Management of the Registry's staff to ensure smooth activity of the judicial machinery (e.g. rosters)

136. As soon as an accused was transferred to the residual mechanism(s), there would be a stronger case for the president to be present at the seat to coordinate with all the organs of the mechanism(s). In addition, the president could, as a judge, deal with some preliminary judicial steps (e.g. initial appearance of the accused). The presence of the prosecutor at the seat of the residual mechanism would be necessary during the pretrial and trial phases. The registrar would be required on a full-time basis. Three judges would be required to compose a trial chamber. Their presence on a full-time basis at the seat of the mechanism would be necessary during the hearing of evidence in court, and possibly during the judgement drafting phase. It might be appropriate to have one judge present at the seat to manage the pretrial proceedings and organize the commencement of the trial. Depending on the actual workload to be performed, this judge could be the president. If there are any interlocutory appeals, five additional judges would be necessary to compose the appeals chamber. If there is an appeal against judgement, the five appeals chamber judges would need to be present at the seat for any hearings (the proceedings are mainly in writing), and possibly also for the judgement-writing phase. It might be necessary for one of them to be present at the seat throughout the appeal process to coordinate the work on appeal.

137. The staff requirements will vary depending on the stage of the proceedings (pretrial, trial and judgement-writing phase), as each of these stages generates a different amount of work for each concerned organ. The staffing needs for the archives (see para. 133 above) would, however, remain constant at all stages of the proceedings.

138. In addition to the staffing requirements set out in section VI.B.1 (a) above, during the pretrial phase, the trial chamber would require the support of at least one additional legal officer and one additional administrative assistant. This administrative assistant would also provide assistance to the appeals chamber when activated. In the event of interlocutory appeals, one additional legal officer would be needed to provide assistance to the appeals chamber.

139. In the office of the prosecutor, the preparation of the trial hearings would require the additional assistance of a trial team (including a senior trial attorney, two trial attorneys, three legal officers, a junior legal officer and a trial support assistant) and a reinforced investigatory trial team (including three additional investigators and a case manager). If a large number of fugitives remain at large, the office of the prosecutor would additionally need the support of a senior investigator and at least two additional investigators. The office of the prosecutor would also require an appeals counsel to deal with any interlocutory appeals.

140. To support the preparation of the trial, the registry would require the additional assistance of a judicial support unit (composed of a legal officer, a junior legal officer and a courtroom assistant), a witness protection unit (including a protection officer and a witness assistant) and the language services (with a chief, at least six senior interpreters/revisers, three translators and three assistant translators). Each of these units at the registry would need the support of an administrative assistant. In addition, a legal officer and, where necessary, a financial investigator would be in charge of any legal aid matter (and, where appropriate, enforcement of sentences). The detention unit would be composed of a chief and at least six detention guards. In the event of an interlocutory appeal, the judicial support unit would be reinforced with the assistance of an additional legal officer and administrative assistant.

141. At the trial stage, the trial chamber would need the additional support of two junior legal officers. The office of the prosecutor could remain at the same level of staff as at the pretrial stage. The registry would need the following additional staff: two administrative assistants for judicial support; an associate support officer, a witness assistant and a field officer for the witness protection unit; an administrative assistant for the languages services; and a deputy chief and two additional guards for the detention unit. The appeals chamber would require the additional assistance of a junior legal officer, in the event of interlocutory appeals.

142. During the judgement-writing phase, in view of the anticipated high level of work for the trial chamber, its supporting team would remain the same as during the trial phase. After the closing arguments, the prosecutorial trial team and investigatory trial team could be reduced to a senior trial attorney, a trial attorney, two legal officers, a junior legal officer, a trial support assistant, two investigators and a case manager. The registry staffing requirements would also return to the same as for the pretrial phase, except for the languages services, which would remain the same as during the trial phase in view of the high volume of translations necessary for the preparation of the judgement (including translation of closing briefs) and any appeal of the judgement, and the translation of the judgement.

143. In the event of an appeal against the judgement, the appeals chamber would need the assistance of one experienced legal officer and one to three legal officers or junior legal officers, depending on the size and complexity of the case. The office of the prosecutor could be composed of the staff needed during the judgement phase, plus one appeals counsel. The registry staffing would be the same as for the pretrial phase.

144. The above staffing estimates represent the minimum requirements for a single-accused trial. More staffing would be necessary where the case is a complex one. Overall, it is estimated that the residual mechanism or branch, in this illustrative example, would have a staff totalling around 88. The rough estimate of the cost of this tentative staffing complement is $15 million per annum.

(c) Several trials ongoing and management of the archives

145. In this scenario, there is more than one single-accused trial ongoing before the residual mechanism(s). At the same time, the mechanism(s) would carry out the management of the archives. It is assumed that the staffing estimates under the preceding illustrative example can be used as an average basis for each trial. The staff required for the management of the archives (see para. 133 above) would remain constant.

146. Therefore, if two trials were ongoing, although there may be some economies of scale, the notional staffing costs would be roughly double the staffing costs under the preceding example. The residual mechanism or branch, in this illustrative example, would have a total staff of around 163 and a staffing cost in the region of $28.3 million per annum.

2. Middle level of functions

147. In this illustrative example, the residual mechanism(s) would take on the two functions mentioned above (trial of fugitives and management of the archives) plus cases of contempt in connection with trials that had taken place before the Tribunals, protection of witnesses who are protected by prior decisions of the Tribunals and enforcement of sentences of persons who were convicted by the Tribunals. The staffing estimates are presented on the basis of no trial activity ongoing, one trial ongoing and more than one trial ongoing. It is assumed that the staffing needs for the management of the archives set out in paragraph 133 above would remain constant in each of these scenarios.

(a) No trial ongoing, but protection of witnesses and enforcement of sentences ongoing

148. No trials of fugitives or contempt proceedings are ongoing. The fugitives to be tried remain at large. The residual mechanism(s) will carry out the following types of activity:

Chambers	* Variation of protective orders (if arising)
Office of the president	* General policy on the operations (e.g. designation of judges/chambers to cases), and where necessary, representation of the mechanism(s)
	* Enforcement of sentences
	* Requests for pardon or commutation of sentences (if arising)
	* Appeals of registrar's decisions (on defence counsel issues, conditions of detention, etc.) (if arising)
Office of the prosecutor	* Tracking the fugitives and securing their arrest
	* Filing submissions (e.g., in connection with protective orders)
	* Responding to requests for cooperation and assistance from States
Registry	* Filing, distributing and translating documents (where necessary)
	* Monitoring and protecting witnesses
	* Supervision of enforcement of sentences
	* Management of archives

* Management of the registry's staff to ensure smooth activity of the judicial machinery (e.g. rosters)

149. In this scenario, the president and prosecutor would not be required on a full-time basis at the seat of the residual mechanism(s). There would be a stronger case for the registrar to be present at the seat on a full-time basis given the functions to be performed. One to three trial judges and five appeals judges (in the event of interlocutory appeals on protective orders) would be required as under the scenario described in section VI.B.1 (a) above.

150. In view of the additional potential judicial activities related to the protection of witnesses and enforcement of sentences (compared to the scenario described in section VI.B.1 (a) above), there would be need for a legal officer and administrative assistant to support the work of the trial chamber, while an experienced legal officer as head of the office of the president/chef de cabinet and an administrative assistant would support the office of the president. The head of the office of the president/chef de cabinet would also provide assistance to the chamber, where necessary, and the administrative assistant would assist both the trial chamber and the appeals chamber, when required. In the event of an appeal, an additional legal officer would be required to assist the appeals chamber. The office of the prosecutor would be composed of the same staff as described in section VI.B.1 (a) above, with possibly the additional assistance of one legal officer and one administrative assistant. Furthermore, depending on the number of remaining fugitives, one or two additional investigators might be necessary. In the event of appeals proceedings, some officers in the office of the prosecutor would be assigned to appeals work.

151. The office of the registrar would include an experienced legal officer and an administrative assistant (as in the scenario described in section VI.B.1 (a) above). The witness protection unit and the legal aid unit would have the same staffing requirements as described for the pretrial phase in section VI.B.1 (b) above. The judicial support unit would require the assistance of one legal officer and one administrative assistant, while the language service could be composed of one chief and one administrative assistant. In addition, the registry's judicial support unit for the trial chamber would provide support to the appeals chamber. The staffing requirements for the archives remain the same as those described in section VI.B.1 (a) above.

152. Overall, it is estimated that the residual mechanism or branch, in this illustrative example, would have a staff totalling around 38. The rough estimate for the cost of this minimal staffing is $5 million per annum. Compared to the scenario described in section VI.B.1 (a) above, an additional amount of approximately $1.5 million per annum would be required.

(b) Trial of one fugitive, and protection of witnesses and enforcement of sentences ongoing

153. As explained in paragraph 60 above, the trial of fugitives is the function that would require activity by all the potential organs of the residual mechanism(s) at the highest level: the presence of the trial judges, prosecution and defence counsel at all times during the presentation of the evidence, and a high level of registry support. The other potential residual functions would generate work of an ongoing and generally less urgent nature, and could be performed simultaneously with the work

to be performed in connection with the trial. The presence of the president and prosecutor at the seat of the mechanism would be necessary during trial, as in the case of the scenario described in section VI.B.1 (a) above. The registrar would be required on a full-time basis.

154. While the requirements for judges and staffing for conducting a single-accused trial and managing the archives (see above under section VI.B.1 (b)) would be approximately the same, it is anticipated that the witness protection unit of the residual mechanism(s) would require some additional support. During the pretrial and judgement phases of this illustrative example, the witness protection unit could be composed of the same number and level of registry staff necessary during the trial phase in a single-accused case under the illustrative example in section VI.B.1 (b) above, that is, when the mechanism is running one single-accused trial and managing the archives. However, during the trial phase, the work of the witness protection unit would require daily action to ensure the attendance of the witnesses in court and their continuous protection. One additional associate support officer, one witness assistant and one field officer would normally be sufficient.

155. Overall, it is estimated that the residual mechanism or branch, in this illustrative example, would have a staff totalling around 91. Compared to the illustrative example in section VI.B.1 (b) above, the additional costs resulting from additional staff for the witness protection unit would amount to approximately $500,000 per annum. The rough estimate for the total cost of the staffing is approximately $15.5 million per annum.

(c) Several trial proceedings, protection of witnesses and enforcement of sentences ongoing

156. Under this scenario, there may be, for example, the trial of one fugitive ongoing and a trial for contempt, or more than one fugitive trial. At the same time, the residual mechanism(s) would carry out the management of the archives, the protection of witnesses and the enforcement of sentences (resulting from cases of the tribunals).

157. It is assumed that the staffing estimates under section VI.B.2 (b) above can be used as an average requirement for each trial. Therefore, if two trials are ongoing, although there may be some economies of scale, the ball-park staffing costs would be roughly double the staffing costs under section VI.B.2 (b). In other words, if two trials are ongoing, the residual mechanism or branch, in this illustrative example, would have a staff totalling around 169. The rough estimate for the cost of this staffing is $29.3 million per annum.

3. Maximum level of functions

158. Under this illustrative example, the residual mechanism carries out all the residual functions, including those in connection with trials that had taken place before the Tribunals. The staffing estimates are presented on the basis of no trial activity ongoing, one trial ongoing and more than one trial ongoing. It is assumed that the staffing needs for the management of the archives set out under section VI.B.1 (a) above would remain constant in each of these scenarios.

(a) No trial proceedings ongoing, but all other residual functions being performed

159. No trials of fugitives, contempt or review proceedings are ongoing. Some or all of the fugitives remain at large. In comparison with the scenario described in section VI.B.2 (a) above, the chambers have to deal, in addition, with preliminary examination of review applications and requests for referral, if such issues arise. The office of the president may have to deal with designation of judges and chambers to such cases. The office of the prosecutor may have to file submissions in connection with requests for review and referral and, where applicable, monitor referred cases and seek the assistance of States for the referral of cases. The registry may have to manage the filing, distribution and translation of additional documents. The president and prosecutor would not be needed on a full-time basis at the seat of the residual mechanism(s), but the full-time presence of the registrar would be required.

160. Bearing in mind that the additional functions (review and referral) would mainly be dealt with in writing, the anticipated workload generated, and therefore the judges and staffing needs, would be roughly the same as under the scenario described in section VI.B.2 (a) above. There may be a need for some additional resources at the chambers (e.g. one or two junior legal officers) and at the registry (e.g. for the language services in anticipation of a larger volume of documents).

161. Overall, it is estimated that the residual mechanism or branch, in this illustrative example, would have a staff totalling around 41. In total, compared to the illustrative example described in section VI.B.2 (a), the additional staffing costs would amount to approximately $500,000 per annum and the rough estimate for the total staffing cost is $5.5 million per annum.

(b) Trial of one fugitive and all other residual functions being performed

162. Under this scenario, there is one fugitive to be tried. No trial for contempt or review of judgement is ongoing. In addition, the residual mechanism(s) perform(s) all the other residual functions (tracking the remaining fugitives, including responding to requests for assistance from national authorities; protection of witnesses; supervision of enforcement of sentences; preliminary examination of requests for review (if arising); requests for referral (if arising); and management of the archives). The presence of the president, prosecutor and registrar would be required as in the illustrative example presented in section VI.B.1 (b) above.

163. The judges and staffing requirements in this illustrative example would be roughly the same as those described in section VI.B.2 (b) above, that is, the residual mechanism or branch would have a staff totalling around 91. The rough estimate for the cost of this staffing is approximately $15.5 million per annum.

164. Given that all of the residual functions are performed in this example, the possibility of a heavier than expected workload, and therefore of a need for increased staffing, is greater. In that event, additional staff might include junior legal officers in chambers, trial attorneys and/or investigators in the office of the prosecutor, and legal officers and/or language staff in the registry. The rosters of legal officers, counsel, interpreters, translators and court reporters would be useful for such increases in staff requirements.

(c) Several trial proceedings ongoing and all other residual functions

165. In this example, there would be more than one trial ongoing, for example, a single-accused fugitive trial, a trial for contempt and a trial following a decision to review a judgement. At the same time, the residual mechanism(s) would perform all the other residual functions (tracking the remaining fugitives, including responding to requests for assistance from national authorities; protection of witnesses; supervision of enforcement of sentences; preliminary examination of requests for review (if arising); requests for referral (if arising); and management of the archives).

166. The staffing estimates in section VI.B.3 (b) above can be used as an approximate requirement for each trial, bearing in mind that the staff would be required to work on different cases simultaneously. The performance of the other ongoing residual functions would be managed by the same staff. Therefore, if two trials are ongoing, although there may be some economies of scale, the staffing costs would be roughly double those shown in the aforementioned section. In other words, if two trials are ongoing, the residual mechanism or branch in this illustrative example would have a staff totalling around 169. The rough estimate of the cost of this tentative staffing is $29.3 million per annum.

167. Again, the possibility of a heavier than expected workload is greater in this illustrative example and additional staff may be required, including junior legal officers in chambers, trial attorneys and/or investigators at the office of the prosecutor and legal officers and/or language staff in the registry.

4. Archives only

168. This scenario would arise if the Security Council were to decide that the archives should be managed separately from the residual mechanism(s). The staffing estimates for the management of each of the archives of the Tribunals are the same as the one described in paragraph 133 above, that is, around 12 staff and one chief archivist responsible for the oversight of both Tribunals' archives. The estimated cost of such staffing would be approximately $1.7 million for the management of each of the archives.

169. However, if the Tribunals' archives were to be located and managed separately from the mechanism(s), an archives unit would need to be established also at the mechanism(s), because it (they) will generate its (their) own records as well. The staffing estimate for this archives unit would, over time, become similar to the one required for a stand-alone management of each Tribunals' archives. In other words, if the Security Council were to establish a stand-alone management of the Tribunals' archives, the result would be three similarly staffed archives units (if the Tribunals' archives are in two locations) or two similarly staffed archives units (if the Tribunals' archives are in one location). Co-locating the Tribunals' archives with the mechanism(s) would therefore reduce the number of archives units required and accordingly be more cost-effective and efficient.

170. In addition, if the Tribunals' archives are managed and located separately from the residual mechanism(s), and unless they remain in their current locations,[38] there would be additional costs for their secure and safe transfer to the location where

[38] On the other hand, there would also be renovation costs if the Tribunals' archives were to remain at their current locations (see paras. 225 and 226 below).

they will be housed. Further, there would be ongoing costs (and risks) associated with the transport of original records from the Tribunals' archives to the mechanism(s) as and when needed for the performance of the residual functions.

C. Other foreseeable costs

171. In addition to the staffing costs, costs associated with the premises and operational costs, other expenses will have to be taken into account to determine the budgetary implications of potential location(s) for the residual mechanism(s) and archives of the Tribunals. These include the costs associated with transfer of accused and convicted persons, legal aid, witness protection, enforcement of sentences and management of the archives. As indicative information, some tentative assessments of these costs are presented below.

1. Transfer and detention of the accused

172. There will be costs associated with the transfer of an accused from the State of arrest to the seat of the residual mechanism(s) and then, where appropriate, with the detention of the accused while trial proceedings are ongoing. Likewise, if the mechanism(s) were to order the referral of a case to a national jurisdiction (if the Security Council decides to transfer such function), there will be costs associated with the transfer of that accused to the concerned State.

173. Those costs will vary according to the location of the residual mechanism(s). As an illustrative example, the expenses for the transfer of an accused to or from ICTY are estimated at $3,800 and to or from ICTR at $5,600. The cost of detention of one accused at the ICTY detention facility and the ICTR detention facility is approximately $100,000 per annum and $14,020 per annum (excluding costs for detention facility staff) respectively.

2. Legal aid

174. If an accused or convicted person is found to have insufficient means to be legally represented or assisted by counsel of his or her choice, the Registrar of the Tribunal may decide to assign counsel. This is in accordance with the right of each accused to legal assistance. Both Tribunals have developed specific rules on the assignment of defence counsel and payment of remuneration and strict control of these expenses.[39]

175. The trial of a fugitive, contempt and review proceedings, variation of protective measures, referral of cases and requests for pardon or commutation of sentences may require the assistance of counsel. If these functions were to be transferred to the residual mechanism(s), the costs resulting from legal aid should be factored in.

176. On the basis of the current budgetary provisions for ICTY and ICTR, legal aid for the trial in a single-accused case ranges from $1.2 million to $2.1 million (inclusive of pretrial, trial and appeal). As a further indication, in his report on financial obligations with regard to the enforcement of sentences, the Secretary-General suggested an annual provision of $52,000 for legal assistance for five

[39] Directives on the assignment of defence counsel promulgated by the Registrars of each Tribunal.

prisoners seeking pardon or commutation of ICTR sentences, and the same amount for legal assistance for a projected five prisoners seeking review of judgement.[40]

3. Witness protection

177. Trial proceedings will generate expenses related to the witnesses called to testify, including travel expenses for the witnesses and, where necessary, the accompanying protection officer, payment of daily subsistence allowances, housing of the protected witnesses in safe houses, etc. The monitoring and protection of witnesses may also require the protection officer to travel to the country where the witness resides.

178. All of these costs will vary according to the location of the residual mechanism(s) (and location of the witnesses). According to the current ICTY and ICTR budgetary provisions, the costs range from $200,000 to $300,000 per annum for a single-accused trial and are in the region of $50,000 per annum for the ongoing management of a witness (including his or her family).

4. Enforcement of sentences

179. Under standard agreements concluded with States by the Tribunals, on behalf of the United Nations, the Tribunals bear the expenses related to the transfer of the convicted person to and from the enforcement State, unless the parties agree otherwise. The enforcement State bears all other expenses incurred by the enforcement of sentences.

180. The Secretary-General's report on financial obligations with regard to the enforcement of ICTR sentences has provided cost estimates arising from the enforcement of sentences. As an indication, the cost of transfer to and from States was estimated at $140,000 (on the assumption that there are to be 50 convicted persons requiring transfers), the cost of relocation between States (when it becomes undesirable, inappropriate or impossible for a prisoner to continue to serve his or her sentence in a particular State) at $30,000 (for 5 convicted), and the annual cost of carrying out inspections of conditions of imprisonment at $16,800. Although those estimates were done in connection with persons convicted by ICTR, they could be used as illustrative examples of estimates also for those convicted by ICTY.

181. Due to the particular financial situation of some enforcement States, ICTR has undertaken to bear the expenses of basic upkeep of convicted persons transferred by the Tribunal as well as the expenses of the repatriation of the body of the convicted person, in case of death, and the transfer of the convicted person to a suitable State, upon completion of his or her sentence.[41] In its resolution 57/289 of 12 February 2003, the General Assembly concurred with the Secretary-General that it would be appropriate for the United Nations to bear the immediate costs arising from providing prisoners serving sentences imposed by ICTR with a regime of imprisonment that complies with international minimum standards of detention.

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[40] A/57/347, paras. 33 and 35. Those estimates are based on an assumption that in any one year, 10 per cent of the estimated 50 convicted persons may seek pardon or commutation or review of judgement.

[41] See the agreements concluded with Mali and Swaziland.

182. As indicative information, it can be noted that in the 2002 report of the Secretary-General on financial obligations with regard to the enforcement of ICTR sentences (A/57/347), the upkeep costs for a projected 50 prisoners were estimated at $725,000. That report also presented an estimate $104,600 for the cost of the repatriation of the body of the convicted person, based on the assumption that 37 convicted persons may die while serving their sentence, and $36,400 for the cost of the transfer of approximately 13 convicted persons upon completion of their sentence. In 2009, the estimated annual costs for the upkeep of 15 ICTR prisoners in one State amounted to approximately $220,000.

5. Archives

183. Once the functions of the residual mechanism(s) are identified, appropriate technology is needed to support the administration of the Tribunals' archives and the records of the mechanism(s). The Tribunals have adopted a range of technologies to support judicial proceedings and to manage the resulting records. The Tribunals, in consultation with the Archives and Records Management Section, should identify an appropriate recordkeeping technology infrastructure for the mechanism(s). They should also develop a strategy to minimize costs and risks associated with the anticipated migration and transfer of records in all formats to the mechanism(s) or other institution designated to receive them.

184. The approximate costs for this recordkeeping infrastructure are in the region of $3 million for the capital expenditure costs and $700,000 for recurring information technology costs per year (including maintenance support and Internet connections).

VII. Potential locations

185. In October 2007, the Registrars of the Tribunals established the Advisory Committee on Archives, chaired by Justice Richard Goldstone, to examine the requirements for the future location and management of the Tribunals' archives and provide a review of locations that would be appropriate for housing them. After conducting various consultations (including with the countries of the former Yugoslavia and Rwanda), the Committee submitted a final report in September 2008. It made 34 recommendations and provided a comparative analysis of two options for the housing of the Tribunals' archives: either a single location at United Nations Headquarters in New York or two separate locations, one in Africa for the ICTR archives (Arusha, Nairobi or Addis Ababa) and one in Europe for the ICTY archives (The Hague, Vienna, Geneva or Budapest).

186. In its report, the Committee strongly recommended separate locations for the archives of each Tribunal, with a location on the continent of each affected country. It also stressed that the Tribunals' archives would be inextricably linked to the performance of residual functions by any institution to be created by the United Nations. It advised that serious consideration be given to the co-location of the archives with the institution that would handle the residual functions. In the Committee's view, for as long as the archives contain a substantial number of confidential documents, they should not be transferred to Rwanda and the countries of the former Yugoslavia. The Committee suggested, however, that when there is no longer a substantial number of confidential documents in each of the archives, the

United Nations should consider, while retaining ownership, transferring their physical custody to a country of the former Yugoslavia and Rwanda, respectively.

187. The Tribunals endorsed some of the recommendations made by the Committee, including (a) that five criteria (archival integrity, security, preservation, access and (de)classification and technology) should be taken into account in the evaluation of the appropriateness of a location; (b) that the archives of each Tribunal should be separately located, in Africa for ICTR and in Europe for ICTY; (c) that the archives should be co-located with the residual mechanism(s); (d) that information and documentation centres should be established in the affected countries; and (e) that particular attention should be given to the management of confidential documents and access to them by national prosecuting or administrative authorities.[42] ICTY does not support the Committee's recommendation that, when there is no longer a substantial number of confidential documents in each of the archives, the United Nations should consider transferring their physical custody to a country of the former Yugoslavia and Rwanda. In the Tribunals' view, it would be impossible, logistically and politically, to do this in the foreseeable future because the archives would need to be copied in their entirety for each of the countries of the former Yugoslavia. ICTY, however, did not exclude the possibility of transferring its archives to one location in the countries of the former Yugoslavia when all the confidential material has been declassified. ICTY also recommended that additional locations in Europe where large United Nations common system operations are present, such as Rome, Turin, Bonn and Paris, be considered as possible locations.

188. The Committee's report, and the Tribunals' comments thereon, are useful in addressing the issue of the potential locations for the Tribunals' archives and/or residual mechanism(s). However, as the locations suggested were not assessed by the Committee and the Tribunals in terms of their capacity to house the archives and/or a co-located courtroom facility, this section of the report has been prepared on the basis of replies by United Nations and other offices at the potential locations to a standardized list of questions about the capacities of the locations to meet the infrastructure requirements.

189. Section A below describes the attributes required of a suitable location for the housing of the Tribunals' archives and/or the residual mechanism(s). Section B details the potential locations consulted in the light of these criteria, and the results of the consultations. Bearing in mind the variables yet to be decided by the Security Council before determining a location (including whether there will be one or two residual mechanism(s), and whether the archives should be co-located and managed by the mechanism(s) or transferred to another United Nations body), it was considered premature and over-ambitious at this stage to go beyond the current consultations with United Nations and other offices by beginning discussions with the relevant Governments for all of the potential locations identified by the Committee and the Tribunals. Should the Security Council be inclined to consider in greater depth any of the proposed options for locations, further discussions with the offices concerned and with their host Governments would be necessary.

190. Cost estimates for constructing or renting premises were provided by some of the offices consulted and are presented below. It must be stressed that they are

[42] ICTY answers to questions posed by the Working Group on 18 November 2008, 2 December 2008; ICTR proposed international mechanisms, updated ICTR submissions, 1 December 2008.

highly provisional and do not include the operational costs, such as security, information technology services, procurement, telephone, telecommunication and audio-visual services, facilities management and other services such as medical services, travel and shipping services and transportation of staff. All of these costs may fluctuate according to the location, and will therefore need to be considered at the appropriate stage.

A. Criteria and infrastructure requirements for the archives and residual mechanism(s)

191. A number of standards and criteria have to be taken into account when determining the location(s) for the Tribunals' archives and the residual mechanism(s). These include standards applicable to maintaining and preserving the archives, and infrastructure requirements for a criminal courtroom facility.

1. Standards and criteria applicable to the archives

192. Each Tribunal has estimated that the space necessary to house and maintain its respective archives is at least 700 square metres, including approximately 400 square metres for repository floor space and 150 to 200 square metres for office space and a designated study area able to satisfy demand for public access to the records. Furthermore, some temporary administrative records will need to be preserved for a certain period (in addition to the Tribunals' records considered as archives). A storage capacity should also be provided for these temporary administrative records. A records appraisal would enable a final assessment of the exact size of the archives and temporary records.

193. In addition, the institution responsible for the Tribunals' archives should comply with a number of archival standards, which will have a bearing on the choice of the location(s). This determination should be made taking into account the (future) users of the archives and the issue of the management of confidential information.

(a) Standards and infrastructure requirements

194. The institution responsible for the Tribunals' archives should comply with a number of archival standards including the principles of archival integrity, security, preservation and access. The necessity to comply with these standards will have an impact on the choice of location for the archives.

195. According to the principle of archival integrity, "the records of a given agency should be kept together as the records of that agency, such records should be kept, as far as possible, in the arrangement given them in the agency in the course of its official business, such records should be kept in their entirety, without mutilation, alteration, or unauthorized destruction of portions of them".[43] Each of the archives of the Tribunals should therefore be preserved as a complete entity, and within each of the archives, the records received and generated by the different organs should be kept separate. Thus, for example, transferring the public and confidential documents to separate locations would not be compatible with this principle.

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[43] T. R. Schellenberg, *Modern Archives: Principles and Techniques* (Chicago, University of Chicago Press, 1956), p. 15.

196. Security must be guaranteed in the management of the Tribunals' archives to prevent unauthorized access to confidential records and to preserve the integrity and authenticity of the archives. Failure to do so could endanger persons who provided information or testified before the Tribunals, raise issues of national security for States and breach the Tribunals' obligation to uphold confidentiality. Confidential records should be appropriately identified and protected from unauthorized access. The premises housing the archives, including any space where the records will be used, must have a robust physical security infrastructure.

197. Preservation of the Tribunals' archives, including audio-visual and other digital records, requires migration to new applications as technology changes to ensure that they are kept accessible. Preservation also requires that the physical infrastructure presents the capacity to store the hard-copy and digital records in appropriate environmental and storage conditions with resources to maintain the facility.

198. Access refers to the ability to locate information (through the use of catalogues, indexes, finding aids, etc.) and the permission to locate and retrieve information for use within legally established restrictions of privacy, confidentiality and security clearance. It involves having an ongoing programme of records declassification to ensure that classified records can be declassified and made public when the information in the records is no longer sensitive.

199. Bearing in mind the above-mentioned standards, good practice for housing and maintaining the Tribunals' archives would require, at a minimum, a free-standing facility or a part of a shared building that is capable of being completely isolated from other activities; a robust building affording protection against fire, flood, damp, dust, pollutants and pests, with floors able to bear the heavy load of compact shelving; separate storage areas meeting international standards of climate control and protection against dust, dirt and pollutant gases; and accessibility to the public.

200. Details of these minimum infrastructure requirements for the archives were included in the questionnaire sent to the various potential locations consulted.

(b) Users of the archives and protected information

201. Who the users of the archives will be is a key consideration when determining where the archives should be located. As mentioned above, there are, and will be, many different users according to the different values of the records (paras. 55 et seq. above). The interests of other potential users, and particularly of the people who were directly affected by the conflicts, should also be kept in mind. It should be recalled that each Tribunal was established as a measure under Chapter VII of the Charter to contribute to the process of national reconciliation and to the restoration and maintenance of peace in the affected countries.[44] The archives are tools for fostering reconciliation and memory.

202. This, however, should be balanced with the need to protect confidential information provided by individuals, entities and States (e.g. protected witnesses and Governments providing confidential information to the Prosecutor). As the Tribunals' records contain a significant amount of sensitive information, this should also be taken into account in the choice of the location(s).

[44] Security Council resolutions 808 (1993) of 22 February 1993 and 955 (1994) of 8 November 1994.

2. Criteria applicable for conducting criminal trial proceedings

203. The Security Council has indicated that the possible location(s) for the seat of the residual mechanism(s) should include the "availability of suitable premises for the conduct of judicial proceedings" by the mechanism(s) (S/PRST/2008/47).

204. According to the information provided by the Tribunals, the minimum requirements for a courtroom include five separate benches for the judges, registry officers, witnesses, prosecution and defence teams and the accused; booths for interpreters and the audio-visual team; a holding cell; a witness waiting room; a public gallery; computer and audio-visual technical equipment (including videoconferencing technology and voice and facial distortion); appropriate space and seating facilities for court reporters and security staff; separation of spaces and routes to protect the confidentiality of protected witnesses. These requirements were described in the questionnaire when consulting the various potential locations.

B. Analysis of potential locations

205. Upon the closure of the Tribunals, in the absence of any decision by the Security Council to the contrary, the archives, as United Nations documents, would become the responsibility of and be transferred to the Archives and Records Management Section at the United Nations Headquarters. There are, however, many technical, cost and political considerations to bear in mind in the determination of the location(s) of the Tribunals' archives and the residual mechanism(s).

206. Housing these archives at any of the possible locations would involve significant initial capital expenditure. On the other hand, moving them to a new location would also inevitably involve capital expenditure, and the risks associated with any such move. If the Security Council were therefore to consider housing the archives in two locations for a short number of years, and then moving them to one location (e.g. as a result of two residual mechanism(s) merging into one), the Council should weigh carefully the benefits of doing so against the costs and risks of such transfer. Further, it will be important for the choice of location to take fully into account the need for a demonstrable sense of African "ownership" of residual functions flowing from ICTR.

207. In addition, with respect to the location of the residual mechanism(s), it should be borne in mind that in the case of trial of a fugitive, there would be a need to transfer the witnesses, who mainly reside in the affected countries, to the seat of the mechanism(s) to testify. Protecting and monitoring the witnesses may also require the prompt presence of witness protection officers in the country where the witness resides (including the affected countries).

208. As a preliminary issue, this section discusses first the question of the co-management and co-location of the archives with the residual mechanism(s). It then sets out the views expressed by the affected countries, and looks at the various locations in Europe and Africa as suggested by the Advisory Committee on Archives and the Tribunals.[45] It also considers United Nations Headquarters in New York as a possible location, and the possibility of making the public records of the Tribunals

[45] The Committee also recommended Budapest as a location, but it was not considered in this report as it has no United Nations office.

as available as possible in the affected countries through the establishment of information centres.

1. Preliminary issue: co-management and co-location of the archives with the residual mechanism(s)

209. The particular nature of the Tribunals and the residual mechanism(s) as judicial institutions, and the link between them, point towards management of the archives by the mechanism(s) and their co-location as the most secure and efficient option.

210. Many functions carried out by the residual mechanism(s) are likely to require access to the original records of each Tribunal, and the mechanism(s) will generate new records intrinsically connected to the Tribunals' archives. Documents or other material in the archives required as evidence in a trial would be more quickly, securely and cheaply accessed if co-located with the mechanism(s). Establishing the "chain of custody" over the evidence would be more straightforward. Any physical or security risks associated with moving the evidence would be lower. The administration of the archives by the mechanism(s) would strengthen the efficiency of the mechanism(s) and reduce the costs and risks that would be generated by separate management and/or separate location.

211. Furthermore, in the scenario where the Tribunals close on a specific date and the residual mechanism(s) take(s) over any ongoing trial and/or appeals proceedings, transferring the archives to a body other than the mechanism(s) or to a location away from the mechanism(s) might disrupt the proceedings. These disruptions could delay ongoing trials, causing additional costs and, possibly, raising issues as to the fairness of the trial and the right of the accused to be tried without undue delay.

212. In the scenario of one residual mechanism with two branches, the above factors pointing in the direction of co-management and co-location of the mechanism and the archives point towards the physical location of each of the archives of the Tribunals being with the relevant branch of the mechanism. This would not exclude the possibility of some element of joint archives management. In the scenario of two mechanisms, the above factors point towards each of the archives being physically located with the relevant mechanism.

2. Affected countries

213. Since the ICTY archives concern six different countries, finding a suitable location in the affected countries meeting all the requirements necessary for their management and preservation would be challenging. While the City of Sarajevo in Bosnia and Herzegovina has expressed its willingness and readiness to house the ICTY archives,[46] Croatia and Serbia have expressed the view that the residual mechanism(s) and archives should be located outside the region of the former Yugoslavia.[47] Both countries support the idea of the mechanism and ICTY archives being co-located in a single site, preferably in The Hague where they are currently located. In the view of the Government of Croatia, it is further important that the

[46] Letter dated 1 April 2008 from the Mayor of the City of Sarajevo to the Secretary-General.

[47] Letter dated 29 January 2009 from the Permanent Representative of Croatia to the United Nations addressed to the Secretary-General; letters dated 10 November 2008 and 24 March 2009 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General.

ICTY archives remain in Europe, and consideration may be given to other sites where the United Nations has an existing presence and where archiving capacity already exists that meets the highest standards of archiving procedures.

214. Croatia and Serbia support the idea of the ICTY archives being centralized, undivided and sited at one location. Both countries oppose locating the ICTY archives in any single country in the region because they believe that there are reasonable doubts as to whether access to the archives would be equal for the populations of all the affected countries. Croatia further expresses doubt as to whether the required archiving standards would be met if the archives were located in the region of the affected countries. On the other hand, Serbia considers that if the ICTY archives were returned to the region, they should be located in the Archives of Yugoslavia in Belgrade.

215. Rwanda has expressed its desire and readiness to take full custody of the ICTR archives.[48] It emphasizes the important historical value of these archives in the reconciliation process and the duty of memory.

216. Based upon the information to hand at this stage, there is no indication as to whether any of the affected countries has a location that would meet the various requirements for the archives set out above. Some views have been expressed to the effect that security and other requirements for archives preservation and access suggest that the best location for the archives would not be in the affected countries, at least at this stage. Other options could be considered to ensure that the public records of the Tribunals are made available to the populations of the affected countries, for example, location close to the affected countries, and information centres (see paras. 234-236 below).

3. Potential locations in Europe and in Africa

217. The interests of the (future) users of the Tribunals' archives as well as an efficient and cost-effective functioning of the residual mechanism(s) suggest considering locations which are not too far from the affected countries. The presence of a United Nations office to house the mechanism(s) and archives is also a factor that has been taken into consideration, both because it was specifically recommended by the Security Council in its presidential statement of 19 December 2008, and because it would be likely to contribute to administrative efficiency and security. In addition, it is reasonable to consider that the archives would be safest when under United Nations control in United Nations premises, or in the premises of another international organization enjoying similar privileges and immunities to those enjoyed by the United Nations.[49]

218. In the light of the above considerations, this report considers 13 potential locations in Europe and in Africa where the United Nations has an important presence. In addition to eight "non-Tribunal" United Nations and specialized agency

[48] Letter dated 23 March 2009 from the Permanent Representative of Rwanda to the United Nations addressed to the Secretary-General.

[49] Convention on the Privileges and Immunities of the United Nations, General Assembly resolution 22 (A) I, 13 February 1946, article II, sects. 3 and 4: the premises of the United Nations are inviolable, and its archives, and in general all documents belonging to it or held by it, are inviolable wherever located.

offices,[50] The Hague and Arusha were considered since they are the current locations of ICTY and ICTR, respectively. Both Tribunals have provided information about their current locations.

219. In The Hague, the Special Tribunal for Lebanon, the International Court of Justice and the International Criminal Court were also consulted. Although the International Criminal Court is not part of the United Nations family, it was consulted because it has been mentioned by some delegations in the Working Group as a possible location for the administrative hub of the residual mechanism(s), and because of its relationship with the United Nations as set out in the cooperation agreement.[51]

220. There is also a possible long-term strategic consideration to bear in mind. There are several ad hoc United Nations or United Nations-assisted criminal tribunals[52] that will, sooner or later, be likely to require residual mechanisms with functions similar to those described in this report. Rather than establish a series of stand-alone and potentially costly residual mechanisms, there would be a certain logic, and possibly economies of scale, in leaving the door open for them each to be attached to one common administrative hub at some point in the future. This might be an existing United Nations office or the International Criminal Court, for example, as the only permanent international criminal court. Such an approach would, of course, require discussion with the United Nations office concerned or with the International Criminal Court.

221. The United Nations Office at Vienna, the United Nations Office at Geneva, the Food and Agriculture Organization of the United Nations (Rome), the Office of the United Nations Volunteers/UNDP (Bonn), the United Nations Educational, Scientific and Cultural Organization (Paris) and the Economic Commission for Africa (Addis Ababa) have indicated that they currently do not have the facilities required to host the Tribunals' archives and/or a courtroom facility. They do not have the necessary space available, and in most cases, the current facilities of these United Nations offices would require considerable renovations and incur considerable expenses to meet the necessary requirements for the storage of the archives and the setting up of a courtroom. The Economic Commission for Africa has indicated that a new building could be constructed in three years time, and has estimated the cost of such construction as roughly $3.5 million to $4 million.

222. While the above-mentioned United Nations offices could not offer an immediate home for the archives and/or residual mechanism(s), they have suggested consulting the concerned host countries. That consultation has not been pursued at this stage, but could be pursued at the stage when the Security Council has developed its thinking on a number of the key outstanding issues that face it,

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[50] The United Nations Office at Nairobi; the Economic Commission for Africa; the United Nations Office at Vienna; the United Nations Office at Geneva; the Food and Agriculture Organization of the United Nations (FAO); the United Nations Interregional Crime and Justice Research Institute; the United Nations Volunteers/UNDP Office in Bonn and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

[51] Relationship Agreement between the United Nations and the International Criminal Court, 4 October 2004.

[52] Apart from ICTY and ICTR, the Special Court for Sierra Leone and the Special Tribunal for Lebanon. The Extraordinary Chambers in the Courts of Cambodia is a national Cambodian court, and may not have a similar need for an international residual mechanism.

including whether there should be one or two mechanism(s), and has narrowed down the options for its (their) location.

223. The United Nations Interregional Crime and Justice Research Institute (Turin) has a two-floor building, recently made available to it by the municipality of Turin, which would satisfy the requirements for hosting the Tribunals' archives. There would be no cost for rent. The Institute, however, indicates that these premises are not suitable for trial activities and suggests that this matter be further discussed with its host country.

224. The United Nations Office at Nairobi does not have the required floor space to receive either of the Tribunals' archives or the residual mechanism(s). It suggests, however, the construction of a new building for this purpose and estimates the cost of such construction as approximately $2.9 million.

225. ICTY has indicated that the continued occupancy of its current building, in its current state, is not advisable without major renovations. According to ICTY, the housing of the archives in the current building would require further investments to create a dedicated repository for the archives in line with the archives preservation standards. ICTY states that the structural space is already available in the current building and would be well suited to the purpose of housing archives. However, further investments in the form of upgrading or updating of the climate control systems would be needed. ICTY indicates that the courtroom facilities already in place at its current premises could be used for trial proceedings, subject to the requisite refurbishments. ICTY suggests, however, that other options be considered such as using courtroom space at the Special Tribunal for Lebanon or the International Criminal Court. The ICTY current lease of its main building runs to 1 July 2012. It may, however, be possible to negotiate an extension of the lease. According to ICTY, depending on the market conditions, the annual cost for renting an office space in The Hague is approximately 150 euros per square metre. It should be noted that the City of The Hague, with the support of the Government of the Netherlands, has indicated its readiness and willingness to make funds available and provide the necessary facilities to host the Tribunals' archives.[53]

226. ICTR suggests two scenarios regarding the capacity of Arusha to serve as the seat of the residual mechanism(s) and the Tribunals' archives: continuing the use of the facilities currently occupied by ICTR, with considerable renovations; or constructing a new facility for the archives and moving the operational facilities of the current courtrooms and reinstalling them in the new facility. According to ICTR, the current premises do not meet the international standards for permanent storage of the archives (including in terms of the location of this building in the centre of town, and sharing the space with private entities). This would, however, not rule out continuing to use this facility on a short-term basis while a permanent custom-built archival facility is constructed. ICTR has estimated that renovating its current premises would cost approximately $900,000, and that the annual costs for rental, security and information and communication technology infrastructure would be in the region of $970,000. According to ICTR, the costs of constructing a new building in Arusha would amount to approximately $4,200,000 for the ICTR archives only, $8,600,000 for both Tribunals' archives and $8,900,000 for both Tribunals' archives and the residual mechanism.

[53] Report of the Advisory Committee on Archives, p. 34.

227. The Special Tribunal for Lebanon does not have the required floor space to house either of the Tribunals' archives. A courtroom for criminal proceedings would be available in early 2010. As the current premises are made available free of charge, the Special Tribunal for Lebanon estimates that the charges for using the courtroom would be related to the direct operating and supporting costs (for example, cleaning, utilities, maintenance, security, IT and audio-visual services). The Special Tribunal for Lebanon will be in a better position to estimate these charges in 2010, once the courtroom becomes operational.

228. The International Court of Justice has indicated that it does not have the necessary space available to host the Tribunals' archives, and that although there is a courtroom facility, it does not meet the requirements to conduct a criminal case.

229. The current premises of the International Criminal Court have only limited space and cannot guarantee sufficient space for either of the Tribunals' archives to be transferred in full. The International Criminal Court is expected to move to its permanent premises in 2014. The estimated cost for the permanent premises is 3,146 euros per square metre. The Court has stated that if a request were made in the near future, the plans for the permanent premises could still be adapted to accommodate the archives of either or both Tribunals. The Court has, and will continue to have, courtroom facilities in its permanent premises.

4. United Nations Headquarters

230. At the closure of the Tribunals, the administrative records with continuing value will be transferred to United Nations Headquarters, where they will probably be used for finance and accounts, human resources, procurement and other residual administrative purposes. The administrative records with no continuing value will be destroyed in situ.

231. Apart from that, the Archives and Records Management Section indicates that United Nations Headquarters does not have the capacity to manage the Tribunals' archives without very significant capital investment. The Section's facility in the "FF" building in Manhattan does not have capacity to store the records of the Tribunals and no expansion of the Section's storage areas at Headquarters is planned or budgeted for. This facility does not have environmental controls for the storage of audio-visual records, nor the equipment, infrastructure or expertise to support audio-visual records in physical or digital formats. The Section advises that the sensitive records of the Tribunals, which constitute the major part of the Tribunals' archives, should not be stored in the Section's offices located in Queens, New York. The Queens facility does not meet some of the requirements for adequate maintenance of the Tribunals' archives, including stringent security requirements and floor loading capacity.

232. In addition to the lack of sufficient storage capacity, locating the Tribunals' archives at United Nations Headquarters would raise issues in terms of administrative efficiency and economy — access to documents in the archives by the residual mechanism(s) for the carrying out of residual functions would give rise to additional costs and risks if the mechanism(s) were located remotely from the archives. Should the Security Council share the view that co-management and co-location of the mechanism(s) and the archives is advisable, the performance of some residual functions, including the trial of fugitives and protecting and monitoring witnesses, would suggest the need for some proximity of the mechanism(s) to the affected

countries (e.g. for the transfer of witnesses to testify). Locating the residual mechanism(s) in New York would raise issues in terms of accessibility of the archives for the people of the affected countries (issues of cost of travel, entry to and stay in the United States, etc.).

233. The Archives and Records Management Section has indicated that, on the basis of the current rental costs for its buildings in Manhattan and Queens, renting additional space would cost $50 to $60 per square foot in Manhattan and $16 per square foot in Queens. Other costs would need to be added, including for the management and preservation of digital and audio and visual records, renovation of floors, etc.

234. As of today, there is no courtroom facility at United Nations Headquarters meeting the requirements for a criminal trial. The construction of such a courtroom would require significant capital investment. Such a courtroom, if constructed, could also be used by other United Nations offices, such as the Office of the Administration of Justice. However, in the event of trial of a fugitive, the courtroom would be needed full-time for many weeks at a time, and over several sessions, limiting other uses.

5. Information centres

235. Preserving the archival integrity of the archives does not preclude the reproduction of some records for use in a location separate from the original archives. The Advisory Committee on Archives and the Tribunals have suggested the creation of "archives branches" — or information and documentation centres — in the affected countries.

236. Those information centres would make available to the public copies of all, or the most important, public records of the Tribunals and of the residual mechanism(s). They would be equipped with computers and Internet access (including to the websites and public judicial records database of the Tribunals and/or mechanism(s)), and would provide all the necessary information on the trials and other activities of the Tribunals and mechanism(s). The creation of such centres would contribute to informing and sensitizing the populations of the affected countries.

237. Several information and documentation centres already exist in various districts in Rwanda. They are jointly funded by the European Union, ICTR and the Government of Rwanda.

VIII. Conclusions and recommendations

238. This report answers the request in the presidential statement of 19 December 2008 (S/PRST/2008/47) as far as possible at this stage of the Security Council's consideration of the issues. A fuller answer would require the Council to take some key decisions. Further, detailed consideration of staffing and other costs are matters for the General Assembly to consider.

239. Eight essential residual functions have been identified by the Tribunals: (a) trial of fugitives; (b) trial of contempt cases; (c) protection of witnesses; (d) review of judgements; (e) referral of cases to national jurisdictions; (f) supervision of enforcement of sentences; (g) assistance to national authorities; and (h) management of the archives. It is agreed among the members of the Working Group that the

closure of the Tribunals should not lead to impunity, and therefore that the residual mechanism(s), drawing on a roster of judges, will have the competence to try fugitives indicted by the Tribunals. The key decisions that remain to be made by the Security Council include (a) whether there should be one mechanism or two, and the related question of its (their) location(s); (b) what the structure of the mechanism(s) should be; (c) when it (they) will commence functioning; (d) which fugitives will be within its (their) jurisdiction; (e) which residual functions will be transferred to the mechanism(s); and (f) whether the archives of the Tribunals should be co-located with, and co-managed by, the mechanism(s).

240. To answer the Security Council's requests as far as possible at this stage, this report suggests very tentative estimates of staffing and costs for the residual mechanism(s); looks into issues related to co-location and co-management of the Tribunals' archives with the mechanism(s); and explores possible locations for the mechanism(s) and archives. Further, in order to assist the Council in making the key decisions referred to above, the report gives as much information as possible on the following issues: (a) the residual functions and their potential transfer other than to the residual mechanism(s); (b) steps that the Tribunals should take before their closure and/or before the mechanism(s) commence(s) functioning; (c) the start date of the mechanism(s); (d) the jurisdictional continuity between the Tribunals and the mechanism(s); and (e) the structure of the mechanism(s).

A. Tentative estimates of staffing and costs

241. The tentative staffing estimates in section VI.B of this report are based on inputs from the Tribunals and on the Security Council's guidance that the residual mechanism(s) should be small and efficient, commensurate with the reduced work of the mechanism(s). The illustrative examples describe tentative staffing estimates where a "minimal", "medium" and "maximum" number of residual functions are transferred to the mechanism(s). These examples are not recommended outcomes, but have been chosen to reflect the fact that there is a range of views among the members of the Working Group.

242. The examples do not include estimates for the pure administrative functions of the residual mechanism(s) (human resources, finance, security, information technology, facilities management, etc.). The most efficient and economical solution is likely to be to attach the administrative management of the mechanism(s) to an existing United Nations office or to another international organization (e.g. the International Criminal Court). Such option will, however, also imply some costs that would need to be factored in at the appropriate stage.

243. The illustrative examples demonstrate that the level of staffing, and therefore the staffing costs, do not vary greatly as a result of the number of functions transferred to the residual mechanism(s), but are affected much more significantly by whether there is a trial ongoing or not. For example, the staffing costs for a minimum level of functions for one mechanism or one branch, with no trial ongoing (see sect. VI.B.1 (a) above), are in the region of $3.5 million per annum. Increasing the number of functions to the medium level (see sect. VI.B.2 (a)) would increase the estimate of staffing costs by only around $1.5 million per annum. However, if the mechanism, or branch, with a minimum level of functions has a trial of a fugitive ongoing, the estimate of staffing costs rises by approximately $11.5 million

per annum. There are also a number of non-staff costs to take into account (e.g. related to the transfer of fugitives, to legal aid, and to witness protection) which would also increase when the mechanism(s) is conducting a trial.

B. Co-location of the Tribunals' archives with, and co-management by, the residual mechanism(s)

244. The Tribunals' archives would most effectively and efficiently be co-located with, and co-managed by, the residual mechanism(s), in terms both of costs and of access to them by the mechanism(s) for the purpose of carrying out the residual functions. If the archives were located and managed separately from the mechanism(s), there would in any event be a need for an archives unit at the mechanism(s) to manage its (their) own records. Over time, the staffing estimate for the archives unit of the mechanism(s) would become similar to the estimate for stand-alone management of each Tribunal's archives. In other words, if the Security Council were to establish a separate stand-alone unit or units to manage the Tribunals' archives, that unit(s) would inevitably duplicate much of the work of the archives unit of the mechanism(s), and increase the staffing and other costs substantially. In addition, separate management and location would produce ongoing costs and risks associated with the transport of original records from the Tribunals' archives to the mechanism(s) whenever required for use in a trial or for the residual functions.

C. Location of the residual mechanism(s) and archives

245. The choice of location for the residual mechanism(s) and archives will, of course, affect the costs, but also raises other important considerations, including the proximity to the affected countries. The interests of the populations who were directly affected by the conflicts should be borne in mind. The public parts of the archives, which are tools for fostering reconciliation and memory, should be accessible to those populations in some form. On the other hand, there is also a need to protect the confidentiality of information in the archives that was provided to the Tribunals by individuals, entities and States. As we have seen, views have been expressed that the archives cannot be located in any of the countries of the former Yugoslavia or in Rwanda, at least at this stage. Indeed, some of the countries of the former Yugoslavia have themselves said that the mechanism(s) and archives should be located outside the former Yugoslavia. Further, based on the information to hand at this stage, there is no indication as to whether any of the affected countries has a location that would meet the various requirements for security, preservation and accessibility of the archives. However, this does not preclude the establishment of information centres in the affected countries to give access to copies of the public record, or the most important parts thereof.

246. In addition, if the Security Council shares the view that co-management and co-location of the residual mechanism(s) and the Tribunals' archives is advisable, the performance of residual functions, including the trial of fugitives and the monitoring of protected witnesses, would suggest a choice of location with some proximity to the affected countries. The transfer of witnesses to testify, for example, would be greatly facilitated if the mechanism(s) were not located on a different

continent to the affected populations. In particular, it will be important that the choice of location takes fully into account the need for a demonstrable sense of African "ownership" of residual functions flowing from ICTR.

247. The above considerations point towards a location for two branches of a mechanism, or two mechanisms, respectively in Europe and Africa, attached to existing United Nations offices, or to another international organization offering similar security and enjoying similar privileges and immunities (for example, the International Criminal Court). In the absence of a decision on this issue by the Security Council, the Tribunals' archives, as United Nations documents, would ordinarily be returned to the custody of the Archives and Records Management Section in New York. That Section has indicated that it does not have the capacity to house the Tribunals' archives at United Nations Headquarters, and considerable capital investment would be required to do so. Further, there is no criminal courtroom facility at United Nations Headquarters.

248. There are other United Nations-assisted criminal tribunals (the Special Court for Sierra Leone and the Special Tribunal for Lebanon) that will, sooner or later, be likely to require residual mechanisms with functions largely similar to those described in the present report. Rather than establish a series of stand-alone and potentially costly residual mechanisms, a longer term strategic view may suggest leaving the door open for them each to be attached to one common administrative hub at some point in the future. This might be an existing United Nations office, or the International Criminal Court, for example, as the only permanent international criminal court. Such an approach would, of course, require discussion with the United Nations office concerned or with the International Criminal Court. It would also require consideration as to how the importance of locating the residual mechanism(s) and archives on the continents of, and with some proximity to, the affected countries could be satisfied.

D. Residual functions and their potential transfer other than to the residual mechanism(s)

249. It is agreed among the members of the Working Group that the residual mechanism(s) should be a small, temporary and efficient organization, commensurate with its reduced functions in the post-completion period. While transferring residual functions other than to the mechanism(s) would be likely to further that aim, the staffing costs section of this report demonstrates that the savings would not be particularly significant.

250. In relation to new trials of fugitives, it is however clear that the residual mechanism(s) will need to have most, if not all, of the residual functions set out in section IV of the report (including trial of contempt cases, protection of witnesses, review of judgements and supervision of enforcement of sentences) to conduct these trial proceedings effectively.

251. Further, it is clear that each of the residual functions arising from proceedings before the Tribunals needs to be carried out, and if not transferred to the residual mechanism(s), should be transferred to a suitable alternative body. National jurisdictions are not necessarily an ideal choice in relation to certain residual functions. For example, transferring cases of contempt of the Tribunals or review of the Tribunals' judgements to national jurisdictions would require the national courts

to determine issues in relation to criminal proceedings that they were not involved in, and in relation to a jurisdiction of which they formed no part. The national courts would be faced with having to rule on the Tribunals' substantive decisions, and the application of their statutes and the Rules of Procedure and Evidence. Inconsistencies of approach among the disparate national jurisdictions taking up these functions from the Tribunals would be inevitable, and arguably would impinge upon individuals' rights. On the other hand, transferring, for example, the inspection of prisons aspect of sentence enforcement to the International Committee of the Red Cross, or to the European Committee for the Prevention of Torture (as appropriate), and transferring the monitoring of cases referred to national jurisdictions to the African Commission on Human and Peoples' Rights or the Organization for Security and Cooperation in Europe (as appropriate), would be compatible with the current practices of the Tribunals and would reduce the number of functions to be carried out by the mechanism(s).

E. Steps that the Tribunals should take before they close and/or the residual mechanism(s) commence functioning

252. Prior to the closure of the Tribunals and/or the commencement of the residual mechanism(s), it is suggested that the Tribunals take a number of steps. These include (a) referring further cases (as appropriate and where possible) to national jurisdictions; (b) strengthening the judicial and prosecuting capacity of the affected countries; (c) identifying records to be regarded as archives and therefore permanently preserved; (d) disposing of any duplicate records and temporary-value records (as appropriate); (e) transferring all electronic records to the main Tribunals' operational and archival databases as appropriate; (f) working with the Secretariat on the regime that should apply to the archives after the Tribunals' closure; (g) reviewing witness protection orders to determine which may be withdrawn or varied; and (h) reviewing all agreements with States and other international bodies, and contracts with private entities, to determine whether any of them should not continue in force in relation to the mechanism(s). Taking these measures would most likely require that additional resources be provided to the Tribunals because they are fully occupied pursuing the completion strategy. Establishing an "advance team" within each Tribunal would help to prepare the closure of the Tribunals and the start of the mechanism(s).

F. Start date of the residual mechanism(s) and jurisdictional continuity between the Tribunals and the mechanism(s)

253. If the Security Council were to decide in advance that the residual mechanism(s) should start on a specific date, and trials and/or appeals are still ongoing on that date, the mechanism(s) will need to commence in trial mode, and therefore have immediately available judges and staffing to continue those proceedings. Conversely, if the commencement of the mechanism(s) is linked to a trigger (for example, completion of trials and appeals), it is likely that the mechanism(s) will commence in "dormant" mode. In the trigger option, given that the Tribunals are unlikely to complete their trials and appeals simultaneously, the Council would have to decide how such period of difference would be handled, including whether the mechanism(s) would commence while one of the Tribunals

would be completing its work. Alternatively, the Council could consider a two-stage approach of establishing the mechanism(s) in principle, followed by a later decision on a commencement date.

254. If a fugitive were arrested at an advanced stage of completion of the Tribunals' work, the Security Council would need to decide whether the residual mechanism(s) should be activated to begin the case, or whether the Tribunals would be competent to take some judicial steps in the case, and then either complete the trial or transfer the case to the mechanism(s). In any event, the Council will need to ensure the continuity of jurisdiction from the Tribunals to the mechanism(s), and if the mechanism(s) and either of the Tribunals coexist, the Council will need to make their respective jurisdictions and competences absolutely clear.

G. Structure of the residual mechanism(s)

255. As the residual mechanism(s) will need to be able to react quickly and efficiently to take up trial activities when needed, it would be advisable to maintain the existing structure of the Tribunals, namely the chambers (including the office of the president), the office of the prosecutor and the registry. The fact that each Tribunal is context-specific, and was established to restore peace and reconciliation in the affected countries, is a powerful argument in favour of two mechanisms, or one mechanism with two branches, located in Europe and Africa respectively. In practice, there may be little difference between two mechanisms and one mechanism with two branches, because in either scenario it will be possible to share certain administrative services and possibly a common president and prosecutor.

256. Whether a common president and prosecutor would be sufficient for the two branches, or the two residual mechanisms, would in practice turn on the amount of work to be performed. Clearly, where the mechanism(s) start(s) functioning on a specific date, and would continue ongoing trial and/or appeals proceedings from the Tribunals, the workload at commencement would be higher and there would be a stronger case for having a president and prosecutor for each mechanism or branch at that time.

257. The residual mechanism(s) will have active periods when there are trials ongoing and "dormant" periods when there are not. The full-time presence of the president and prosecutor would not be necessary at the seat of the mechanism(s) during dormant periods. The presence of a head of the office of the president and a head of the office of the prosecutor would probably be sufficient. During active periods, the full-time presence of the president and the prosecutor would probably only be necessary from the time of transfer of a fugitive to the mechanism(s) until the end of the trial hearings. The full-time presence of the registrar, on the other hand, may be necessary in both active and dormant periods. In active periods, the workload for all organs of the mechanism(s) would be higher. During dormant periods, the registry would be the organ charged with carrying out most of the ongoing residual functions and maintaining up-to-date rosters of staff so that the mechanism(s) can be activated rapidly when needed. Further, there may well be a need for the full-time presence of someone who, in effect, in the absence of a president at the seat of the mechanism(s), would act as the administrative head. All institutions require someone to be in charge on a daily basis. This suggests the need for a registrar for each branch or mechanism.

258. To ensure that the residual mechanism(s) can be activated promptly and efficiently for trial, it (they) should not only be based on a roster of former ICTY and ICTR judges, but also make use of rosters of experienced staff, including legal officers, prosecution and defence counsel, interpreters and translators. Composing the roster of former ICTY and ICTR judges as far as possible would provide institutional knowledge, and would also be indispensable in the event of the mechanism(s), at its (their) commencement, taking over ongoing trials from the Tribunals.

H. Recommendations

259. It is recommended that the Security Council:

(a) Come to agreement on the residual functions to be transferred to the residual mechanism(s) and on its (their) basic structure, and narrow down the choices of locations to allow a more in-depth further examination by the Secretariat (see recommendation (k) below);

(b) When agreeing on the residual functions,

(i) Aim at ensuring that there is no impunity for any of the fugitives and that their trials are fair and conducted in accordance with the rights of the accused;

(ii) Take account of the rights and interests of the individuals concerned, including the accused, the convicted persons, victims and protected witnesses, and the need to assist national authorities by providing support for ongoing investigations and prosecutions by States;

(iii) Consider how these functions should be carried out after the Tribunals' closure if any of them are not to be transferred to the residual mechanism(s);

(c) Transfer to the residual mechanism(s) all of the residual functions necessary to support the trials of fugitives (including trial of contempt cases, protection of witnesses, review of judgements and supervision of enforcement of sentences);

(d) Express clearly in its resolution(s) that the residual mechanism(s) continue(s) the rights and obligations of the Tribunals, and that there is jurisdictional continuity between the Tribunals and the mechanism(s);

(e) Decide that the residual mechanism(s) should have the same three-organ structure as the Tribunals (namely the chambers, including the office of the president, the office of the prosecutor and the registry), on the basis of amended ICTY and ICTR statutes, as the most efficient means for the mechanism(s) to be activated promptly;

(f) Decide that the trial capacity of the residual mechanism(s) will be based on a roster or rosters of a sufficient number of judges, preferably composed of judges of ICTY and ICTR, with a possibility to supplement and regularly update the roster or rosters of judges through elections and/or appointments by the Secretary-General;

(g) Support the establishment of rosters of experienced staff of the Tribunals, who will be available as needed and provide institutional knowledge and experience to the residual mechanism(s);

(h) Consider co-location of the Tribunals' archives with, and their co-management by, the residual mechanism(s);

(i) Consider location of the residual mechanism(s) and archives in Europe and Africa, not too distant from the affected countries;

(j) Support the establishment of advance teams in each of the Tribunals to prepare their closure, and to ensure a smooth transition to the residual mechanism(s);

(k) When it has an agreement on the questions set out in recommendation (a) above, consider requesting a further report from the Secretary-General on the establishment of the residual mechanism(s) (including the necessary amendments to the ICTY and ICTR statutes), the management of the archives and the location of the residual mechanism(s) and archives;

(l) Request that the Tribunals, as part of their completion strategies, from now until their closure, intensify their efforts to:

(i) Refer further cases (where possible and appropriate) to national jurisdictions, and in this regard, strengthen further the capacity of the affected countries;

(ii) Consider possible ways to review witness protection orders and decisions with a view to withdrawing or varying those that are no longer necessary;

(iii) Implement an approved records retention policy in order to identify archives for permanent preservation; identify duplicate records for disposal; identify administrative records eligible for disposal in situ; and identify administrative records with continuing value for transfer to the Archives and Records Management Section;

(iv) Prepare all digital records for future migration into the recordkeeping systems of the institution that is designated to receive them (e.g. the residual mechanism(s));

(v) Prepare all hard-copy archives and inventories for transfer to the institution that is designated to receive them (e.g. the residual mechanism(s));

(vi) Develop, in collaboration with the Secretariat, a regime to govern the management of, and access to, the Tribunals' archives, including for the continued protection of confidential information provided by individuals, States and other entities under rule 70 of the Tribunals' Rules of Procedure and Evidence;

(vii) Develop and implement an information security strategy that includes the appropriate (de)classification of all records and archives;

(viii) Review all agreements with States and other international bodies, and contracts with private entities, to determine whether there are any that should not continue in force after the closure of the Tribunals;

(ix) Examine the feasibility of establishing information centres in the affected countries to give access to copies of the public records or the most important parts;

(m) Request the Tribunals to report to the Security Council on their progress in implementing the above tasks, as part of their regular reporting on the completion strategies.